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NO. 87-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF MENTAL HEALTH AND THE DIRECTORS OF THE MAY AND AUSTIN UNITS AT BOSTON STATE HOSPITAL,

Petitioners,

v.

RUBIE ROGERS, HAROLD WARNER, ABLE BOLDEN, WILLIE WADSWORTH, DONNA HUNT, AND JAMES COLLERAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Did the court of appeals abuse its discretion by holding Massachusetts state officials in civil contempt where a contempt order was neither required nor warranted to ensure payment of a district court judgment under 42 USC § 1988, but instead was improperly designed (1) to coerce the state officials into waiving the Commonwealth of Massachusetts' Eleventh Amendment immunity from postjudgment interest, (2) to punish the state officials if such immunity were not waived, and (3) to compensate the plaintiffs for delay in payment through a monetary award in the form of a fine against petitioners when the court could not lawfully award to them postjudgment interest.

II. Did the court of appeals commit an error of law by holding the state officials in civil contempt where, despite their good faith efforts, it was impossible for them to comply with the court's order and pay the judgment on the date specified without violating state law, where the Eleventh Amendment and principles of comity and equity required moderation and deference by the court to the budgetary process established by state law and the impact of payment of the judgement on that budget, and where the state officials and the Commonwealth were acting in good faith and with diligence to complete the several steps required by state law to pay the judgment.

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THE COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF MENTAL HEALTH AND THE DIRECTORS OF THE MAY AND AUSTIN UNITS AT BOSTON STATE HOSPITAL,

Petitioners,

v.

RUBIE ROGERS, HAROLD WARNER, ABLE BOLDEN, WILLIE WADSWORTH, DONNA HUNT, BETTY BYBEL, AND JAMES COLLERAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Commissioner of the Massachusetts Department of Mental Health and the directors of the May and Austin Units at Boston State Hospital (a facil-

ity within the Department of Mental Health),[1/] defendants below, respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the First Circuit entered July 6, 1987.

OPINIONS BELOW

The memorandum and order of the United States Court of Appeals for the First Circuit entered May 7, 1987 and that court's order entered July 6, 1987 are not reported. They are contained in the Appendix hereto (A. 1-19, infra).

1/ Pursuant to Fed. R. Civ. P. 25(d), Fed. R. App. P. 43(c), and Supreme Court Rules 40.3 and 40.4 the persons who now hold these official positions and were automatically substituted as defendants for their predecessors in office are described by their official titles, rather than by their names.

JURISDICTION

The order of the court of appeals was entered on July 6, 1987. On September 29, 1987, Justice Brennan extended the time for filing a petition to and including November 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XI

Constitution of Massachusetts, Declaration of Rights, Article XXX

Constitution of Massachusetts, Amendment Article LXIII

Constitution of Massachusetts, Pt. 2, c. 2, § 1, Art. 11

42 U.S.C. § 1988

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STATEMENT OF THE CASE

Proceedings In The Lower Courts

On June 27, 1986, the United States District Court for the District of Massachusetts entered a judgment against the petitioners awarding some 1.47 million dollars in attorney's fees and costs pursuant to 42 U.S.C. § 1988 to the respondents. Rogers v. Okin, 638 F. Supp. 934 (D. Mass. 1986).[2/] The nature and history of the underlying litigation which extended over some nine years and included a trip to this Court is recounted

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2/ The decision is not contained in the Appendix since it is not material to the questions presented here.

in the reported decisions.[3/]

After appealing, the petitioners filed a motion for a stay of the judgment in the district court on October 23, 1986, Fed. R. Civ. P. 62, supported by a memorandum and an affidavit from the general counsel to the Massachusetts Executive Office of Administration and Finance. A. 32-35, 43-45.[4/] They requested a hearing. A. 32-35.

3/ Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), aff'd in part, rev'd in part, vacated in part, and remanded, 634 F.2d 650 (1st Cir. 1980), vacated and remanded sub. nom., Mills v. Rogers, 457 U.S. 291 (1982), certified questions answered sub. nom., Rogers v. Commissioner of Mental Health, 390 Mass. 489, 458 N.E.2d 308 (1983), remanded, Rogers v. Okin, 738 F.2d 1 (1st Cir. 1984).

4/ The memorandum is not contained in the Appendix, but it is virtually identical to the one later filed in the court of appeals. See A. 46-67.

The respondents promptly opposed the motion for a stay and moved for an order that the award be paid in full (into a court-monitored, interest bearing escrow account) within forty-five days of the court's order denying a stay. A. 68-84.[5/]

Some three and one-half months later, on February 18, 1987, the district court, without holding a hearing or writing an opinion, denied the motion for a stay pending appeal. 1A. 20. It entered no order regarding a date for payment of the judgment.[6/] Id.

5/ The respondents' opposition is not contained in the Appendix, but it is virtually identical to the one they later filed in the court of appeals. See A. 68-84.

6/ The petitioners also had filed a motion for an order stating their immunity from postjudgment interest in the dis-

(footnote continued)

The petitioners filed a motion for a stay of the judgment pending appeal in the court of appeals on March 31, 1987, Fed. R. App. P. 8, along with a memorandum and an affidavit. A. 39-67. In their motion, they noted, as they had in the district court, that they did not have the money with which to pay the judgment and that the money would have to be requested by the Governor and appropriated by the Legislature.

The respondents again opposed the motion for a stay pending appeal and moved for an order directing payment. A. 68-84.

(footnote continued)

trict court on December 4, 1986. A. 36-38. On February 18, 1987, that motion was also denied (without prejudice) on the grounds that it was premature. A. 20.

On April 7, 1987, the court of appeals heard argument on the petitioners' appeal from the district court judgment, and on the motion for a stay. In the course of the argument, the Court suggested that the petitioners should consider whether the Commonwealth would waive immunity from postjudgment interest in return for a stay, and it encouraged negotiation between the parties. On April 17, 1987, the parties informed the court of appeals that they were not able to settle the case, and that the Commonwealth would not waive its immunity from an award of postjudgment interest. A. 85-86.

The court of appeals denied the motion for a stay on May 7, 1987. It also ordered, inter alia, that the full amount of the district court judgment of some 1.47 million dollars be paid in a form

approved by the district court within forty-five days, i.e., on or before June 15, 1987. A. 13-19. "Should payment not be made by that date, defendants risk contempt and a substantial penalty for every day's delay beyond June 15, 1987." A. 18. The order was based on the court's view that, due to the Commonwealth's refusal to waive its immunity, the respondents would be irreparably harmed by any delay in payment in that they would lose the use of the money which had been awarded. A. 15-16.

On June 12, 1987, the court of appeals vacated the district court's judgment, and reduced the award of attorney's fees and costs from some 1.47 million dollars to about $870,000. Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987). Among other things, the court, relying on the

reasoning of this Court in Library of Congress v. Shaw, ___ U.S. ___, 106 S.Ct. 2957 (1986), decided that the petitioners were immune from an award of prejudgment interest under 42 U.S.C. § 1988 and that the district court's use of current hourly rates rather than historic rates was in error because it was the equivalent of awarding prejudgment interest. 812 F.2d at 26-28.

By June 15, 1987, the money to pay the judgment had not been appropriated by the Massachusetts Legislature despite the good faith efforts of several state officials, including the petitioner Commissioner of Mental Health. See Statement, infra. After being informed of this by the petitioners, the respondents filed with the court of appeals on June 16, 1987, a motion for a court order

holding petitioners[7/] in civil contempt. They also asked that a substantial penalty be imposed for every day's delay in payment after June 15, 1987. A. 87-91.

The petitioners responded, arguing that a contempt order was neither necessary nor appropriate under the circumstances. The Commmissioner had done all required of him by law to obtain an appropriation, and an appropriation by the Legislature was expected shortly, with payment to follow. A. 92-124. See

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7/ In the text of their motion, they also asked that the Commonwealth of Massachusetts be held in contempt. A. 87. However, the Commonwealth has never been and is not a party to this case. Nor did the court of appeals' July 6, 1987 order depend on the Commonwealth being a party; it was only the petitioners who were held in contempt and fined.

Statement, infra.

On July 2, 1987, the court of appeals, acting upon respondents' motion for reconsideration of its June 12, 1987 decision, increased the judgment by some $105,000 to about $975,000. Then, after the parties filed additional papers, A. 125-135, the court of appeals, without hearing, entered an order on July 6, 1987 on the motion for civil contempt. A. 1-12. While the court acknowledged the good faith efforts made by several state executive branch officials, including the Commissioner of Mental Health, it said that good faith was not a defense to civil contempt. A. 5. Instead, the only defense was "impossibility," that is "proof that the party being coerced by the court order lacks the power to comply with it" (emphasis added). A. 6.

However, it concluded that that defense was not available because even though the named defendants did not have the power (or the money) to pay the judgment without violating state law, see Statement, infra, they and the Commonwealth were a single entity; since the Commonwealth was not insolvent and the Legislature conceivably could have appropriated the money by June 15, 1987, compliance was not "impossible." A. 6-9. Nevertheless, after so concluding, the court said:

> If, within two weeks of the date of this order, the Commonwealth agrees to pay the plaintiffs interest at the federal statutory rate on the attorney's fees costs award running from June 15, 1987 to the date of payment, then this court will not find defendants in contempt. Absent timely notification of such an agreement . . . within two weeks of the date of this order this court will hold defendants

> in civil contempt for violating our May 7, 1987 order . . . [I]n the event defendants choose not to avoid a finding of contempt, they are hereby fined $300 for each day's delay in payment beyond the June 15, 1987 deadline . . . .

A. 10-12.[8/]

Two weeks later, on July 20, 1987, the petitioners informed the court of appeals that the Commonwealth declined to waive its immunity, and that the fine would be paid, without prejudice.

The Massachusetts Legislature appropriated the money to pay the judgment on July 16, 1987, as expected. See Statement, infra. The Governor signed that

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8/ The fine of $300 per day exceeded the postjudgment interest. Based on the 7.03 percent per year federal statutory rate (28 U.S.C. § 1961(a)) in effect at the time of the district court judgment (June 27, 1986) and the court of appeals' judgment of about $975,000, the postjudgment interest was about $190 per day.

budget on July 21, 1987, and the judgment was paid that same day. The contempt fine (totalling $10,500) was paid on August 20, 1987.

The Massachusetts Budgetary Process

The Massachusetts Constitution, like its federal counterpart, embodies the principle of separation of powers. See Mass. Const., Declaration of Rights, Art. XXX (A. 22); Opinion of the Justices, 369 Mass. 990, 341 N.E.2d 254 (1976). This principle applies explicitly to the appropriations process, which is specified in amend. art. 63 of the Constitution. Id.; Opinion of the Justices, 375 Mass. 851, 378 N.E.2d 433 (1978) and cases cited; A. 22-24. In addition, Mass. Gen. Laws Ann. c. 29 governs the state budget and finances (A. 25-31). The power to appropriate money lies ex-

clusively with the legislative branch. E.g., Opinion of the Justices, 375 Mass. at 853, 378 N.E.2d at 435-36 and cases cited. The executive officers, such as the petitioner Commissioner, are only authorized to spend money as appropriated by the Legislature for a specified purpose. Id.; A. 24, 28-31.

The submission of a budget request to the Legislature is the Governor's constitutional and statutory duty and sole perogative. All requests for appropriations for a Department must be channelled from its Commissioner through the Secretary, to the Secretary of Administration and Finance, and then to the Governor. A. 22-28. The Governor is required to submit a comprehensive budget proposal each January for the fiscal year which commences the upcoming July 1. This is a massive and complex docu-

ment, to which the Legislature devotes considerable attention over a period of months in an effort to enact the budget by June 30. A. 22-23, 28, 96.

The Governor may submit supplemental or deficiency budgets during the course of the fiscal year. A. 22-24, 28. In recent years, to avoid a proliferation of budget requests to the Legislature, the Governor has adopted a practice of accumulating requests from various state agencies and submitting only two such budgets during the entire fiscal year, one in the winter and the second in the spring. A. 98-99.

After an appropriation is enacted and signed by the Governor, it ordinarily takes several weeks for the issuance of a check, which requires the processing of a warrant through the State Comptroller's office. A. 24, 103.

Violation of the state finance and budget laws by a state official such as the Commissioner is a criminal offense which subjects the official to a fine of not more than one thousand dollars or to imprisonment for not more than one year, or both. A. 31.

The Steps Taken To Comply With The Court Of Appeals' May 7, 1987 Order

The general appropriations act for fiscal year 1987 (which began July 1, 1986 and ended June 30, 1987) was enacted in early July, 1986 (St. 1986 c. 206). That act contained no appropriation for payment of the district court judgment since it was not entered until June 27, 1986.[9/] A. 96-97.

9/ At that point, the bill had been enacted by both the Senate and the House and been sent to a conference committee, a stage at which the introduction of new items was impermissible. A. 97.

The first supplemental budget of fiscal year 1987 was submitted by the Governor in March, 1987, before the court of appeals' May 7, 1987 order denying petitioners' motion for a stay of the district court's judgment pending appeal and ordering payment within forty-five days. As a result, it did not contain a request for an appropriation to pay that judgment. A. 98-99; 133-135.

The court of appeals' May 7, 1987 order was received on Friday, May 8, 1987. The following Monday, May 11, 1987, the Massachusetts Secretary of Administration and Finance wrote to the chairmen of the House and Senate Ways and Means Committees of the Massachusetts Legislature, alerting them to the court's order and requesting that a special appropriation be included in the first

available supplemental budget, including the pending one, to permit payment by June 15, 1987. A. 99, 133-35.

The Governor submitted his second (and final) supplemental budget for fiscal year 1987 on May 29, 1987. A request for an appropriation to pay the judgment in this case was specifically included in this budget. A. 99-100.

On June 11, the Secretary of Administration and Finance renewed his request for prompt legislative action to pay the judgment. A. 100. On Friday, June 12, 1987, the State Budget Director urged the budget directors of the House and Senate Ways and Means Committees to act promptly. They told her it would not be possible to enact a supplemental appro-

priation to pay the judgment by June 15,[10/] but assured her that the committees would include it in the next supplemental appropriation on which they acted; that was expected to be about mid-July, 1987. A. 100.

The months of May and June are the busiest months of the legislative year in Massachusetts. In addition to a rush to enact general legislation before the summer recess, the Legislature is engaged in the process of weighing and debating the budget for the next fiscal year. This typically includes public policy initiatives of great importance. May and June of 1987 were no exception.

10/ On June 11, 1987, when the Legislature enacted the first supplemental budget (St. 1987, c. 131), it chose to include only emergency items necessary to enable state agencies to continue operating and providing services during the remainder of the fiscal year. A. 133-35.

The Legislature was considering, among other things, whether to revamp the state courts, how much to raise welfare benefits, and whether to appropriate $370 million for capital improvements for facilities within the Department of Mental Health. A. 101-103.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO CORRECT AN ABUSE OF DISCRETION THAT THREATENS EVERY STATE AND EVERY STATE OFFICIAL IN THE UNITED STATES.

The purpose of civil contempt is to coerce or compel a recalcitrant party to do what a court has ordered him to do and/or to compensate the opposing party for costs, damages, or other losses it suffers because of his failure to comply with that order. E.g., Hutto v. Finney, 437 U.S. 678, 690-91 and n.17 (1978);

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). Here, given the undisputed facts, there was no need for a coercive order to ensure payment.[11] While compliance may have been delayed because of the elaborate and cumbersome legislative appropriations process required by Massachusetts law, the court had been assured that payment would be forthcoming shortly.[12] Instead, the

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11/ The court suggested that "Because defendants have already violated one order of this court and because plaintiffs suffer irreparable harm for each day's delay in payment, it is clear we must do more than express hope for compliance." A. 11. However, the petitioners had assured the court that all necessary steps had been taken by the executive branch, that the Legislature was expected to act around July 15, 1987, and that payment would be made expeditiously once the budget was signed by the Governor. A. 92-127, 133-135.

12/ In fact, the Legislature acted at about the time petitioners had predicted.

apparent purposes of the July 6, 1987 order were (1) to coerce the petitioners into waiving the Commonwealth's Eleventh Amendment immunity from postjudgment interest under 42 U.S.C. § 1988 by threatening to hold them in contempt and to impose a fine which exceeded the interest if they did not waive it, (2) to punish the petitioners by holding them in contempt despite their good faith efforts and inability to pay and by imposing a fine that exceeded the interest, if the Commonwealth would not waive its immunity, and (3) to compensate the respondents for the delay in payment, by awarding to them indirectly through a fine that which the court was not legally permitted to award to them directly (i.e. postjudgment interest). Cf. Library of Congress v. Shaw, ____ U.S. ___, 106 S. Ct. 2957, 2965-66 (1986) (the court could

not increase by 30% the lodestar award of attorney's fees under Title VII to compensate for delay in payment since it was the equivalent of prejudgment interest which is not allowed against the United States). Accord Rogers v. Okin, 821 F.2d 22, 26-28 (1st Cir. 1987) (under 42 U.S.C. § 1988, court could not award current hourly rates for legal services performed in prior years to compensate for delay in payment since that was the equivalent of prejudgment interest which is not allowed against the State).[13/]

13/ The court of appeals here never squarely ruled on the postjudgment interest immunity issue, but its May 7, 1987 and July 6, 1987 orders assume that there is such immunity based on Library of Congress, supra, and the reasoning of

(footnote continued)

While the petitioners (and the Commonwealth) share the court of appeals' concern that judgments be paid promptly, they do not agree that this purpose is properly achieved by a federal court using its civil contempt powers in this manner. The coercive order was fundamentally unfair to the petitioners and a misuse of the court's inherent equity powers.

Under our federal constitutional system, attempts by the government to coerce a party to surrender individual rights and liberties are not tolerated. See, e.g., Perry v. Sindermann, 408 U.S. 593 (1972); Garrity v. New Jersey, 385

(footnote continued)

its June 12, 1987 decision, 821 F.2d at 26-28, on prejudgment interest immunity would also apply to postjudgment interest immunity.

U.S. 493 (1967); Sherbert v. Verner, 374 U.S. 398 (1963). Here, despite the presence of sovereign immunity, federalism, and comity concerns, the court of appeals sought to coerce state officials (and the state) to waive a constitutional immunity, and then punished them when they would not.

The court of appeals' order sets a disturbing precedent that has serious implications not only for Massachusetts and its officials, but for every state and state official in the United States. Every state official and every state which may be entitled to postjudgment interest immunity on federal court judgments (including, but not limited to, judgments awarding attorney's fees and costs under 42 U.S.C. § 1988 or any other federal fee-shifting statute) is poten-

tially subject to similar threats, coercion, and punishment. This would be true regardless of the impact of immediate payment of the judgment on the state treasury or state budget, the steps required by state law to appropriate money and pay judgments, and the steps taken by the officials (and the state) to do so. Moreover, unless checked by this Court, there is no reason such threats and coercion could not be extended to other constitutional immunities (e.g., prejudgment interest) state officials and states might enjoy in other situations.

Accordingly, this Court should grant the petition and exercise its supervisory powers to correct the court of appeals' clear abuse of discretion.

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The court of appeals rejected the petitioners' "good faith" defense on the ground that it was not a defense to civil contempt. A. 5. Instead, it held that "impossibility," that is, the prsent inability of a party to comply with the court's order is the only complete defense in civil contempt proceedings against state officials. A. 6.[14/]

14/ "Impossibility" is the standard in the case of private parties. E.g., United States v. Rylander, 460 U.S. 752, 757 (1983); Maggio v. Zeitz, 333 U.S. 56, 69-78 (1948). However, this Court's decision in Hutto v. Finney, 437 U.S. 678, 689-93 (1978), suggests that, in light of the Eleventh Amendment, the standard may be "good faith" in the case of state officials. There seems to be some confusion in the lower courts as to the standards and their application in the case of state officials. Compare, e.g., Badgley v. Santacroce, 800 F.2d 33, 36-37 and cases cited (2nd Cir.

(footnote continued)

Petitioners, the only parties before the court below, did all that they lawfully could to to bring about payment

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(footnote continued)

1986), cert. denied, 107 S. Ct. 955 (1987), Fortin v. Commissioner of the Mass. Department of Public Welfare, 692 F.2d 790, 796-97 (1st Cir. 1982) and cases cited, and Halderman v. Pennhurst State School and Hospital, 533 F. Supp. 631, 636 (E.D. Pa. 1981), affirmed, 673 F.2d 628 (3rd Cir. 1983), cert. denied, 465 U.S. 1038 (1984) ("impossibility") with e.g., Florida Nursing Home Association v. Paige, 596 F. Supp. 1152, 1156-58 (S.D. Fla. 1984), relying on Hutto v. Finney, 437 U.S. 678 (1978) ("good faith" effort to comply), Halderman v. Pennhurst State School and Hospital, 526 F. Supp. 414, 422 (E.D. Pa. 1981) ("all reasonable steps within their power to insure compliance"), Swift v. Blum, 502 F. Supp. 1140, 1143 (S.D. N.Y. 1980) ("reasonably diligent and energetic in complying"), and Palmigiano v. Garrahy, 448 F. Supp. 659, 669-674 (D. R.I. 1978) ("diligence, effective control, and steadfast purpose to effectuate the prescribed goals."). Cf. Natural Resources Defense Council v. Train, 510 F.2d 692, 713 (D.C. Cir. 1975) (in case of federal official, equity court looks to whether "the official involved has in good faith employed the utmost diligence in discharging his statutory responsibilities").

by June 15. Their efforts failed because success required actions by others who were not under their control, for example, the Legislature. Conceding petitioners' "good faith," the court nonetheless held them in contempt, holding that the requirements of the impossibility defense had not been met.

The petitioners argue that the court of appeals committed a fundamental error of federal law when it concluded that the impossibility defense was unavailable because the petitioners (parties) and the Commonwealth (a non-party) were a single entity.[15/] Alternatively, if a state

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15/ While the court of appeals also said "it is not at all clear to us that defendants have met their burden of proving that they and other executive officials have done all that they could have done to obtain timely legislative appropriation" (emphasis added), and questioned whether the extraordinary step of an ex-

(footnote continued)

and its officials may be treated as one for these purposes then considerations of comity, sovereign immunity, federalism, and equity require application of a "good faith" defense in civil contempt proceedings against state officials; that defense reflects appropriate deference to the state and its constitutional system of government limiting the authority of individual members of the executive branch and allocating powers among the branches. Because the court of appeals'

(footnote continued)

pedited single item appropriation request had been urged by the executive branch, id., petitioners had explained that such had been requested, but the Legislature chose not to take this extraordinary step. A. 133-35. In the end, the court's speculation on this issue was not the basis for its ruling on the impossibility defense. Compare A. 6-9.

decision has significant practical implications for every state official and every state in the United States, this Court should exercise its supervisory powers to settle these issues.

Where compliance with a court's order is literally or factually impossible, a contempt finding is not warranted because any attempts at coercion are pointless. E.g., United States v. Rylander, 460 U.S. 752, 757 (1983); Maggio v. Zeitz, 333 U.S. 56, 68-79 (1948). Classic examples of impossibility are when a court orders an individual to produce documents that are not in his possession or control, e.g., Rylander, supra, or a court orders payment of money but the individual is impoverished or insolvent, e.g., Badgley v. Santacroce, 800 F.2d 33, 37 and cases cited (2d Cir. 1986), cert.

denied, 107 S. Ct. 955 (1987).

Here, it was undisputed that the Commissioner and the other, less senior petitioners, did not have the money to pay the judgment, and that the money had to be appropriated by the Legislature for that purpose before the judgment lawfully could be paid. It was also undisputed that the Commissioner (as well as other executive branch officials who were not parties) did all within his legal authority to comply with the court's May 7 order, and that he did so well before the June 15, 1987 deadline. Thus, it was a classic case of impossibility. However, because the court of appeals viewed the petitioners and the Commonwealth (a non-party) as "a single entity," and because the Commonwealth was solvent and the money conceivably

could have been appropriated, the court held that it was not impossible for the petitioners to have paid by June 15, 1987. A. 6-9. Under this reasoning, absent insolvency, it would never be impossible for a state official (or a state) to pay a judgment within any time limit by a federal court because revenues could always be raised, assets sold, etc.

It is true that a state official sued in his official capacity and the state are considered one and the same for purposes of liability for an award of attorney's fees and costs under 42 U.C.C. § 1988, regardless of whether the state is a party to the action. See Kentucky v. Graham, 473 U.S. 159 (1985); Hutto v. Finney, 437 U.S. 678, 693-700 (1978). In other words, one to whom the award is owed may collect from or execute on state

funds using appropriate procedures. Contrary to the court of appeals' reasoning, however, it does not necessarily follow therefrom as a matter of law that the officials and the state are legally one and the same for the purposes of a civil contempt proceeding. Indeed, considerations of Eleventh Amendment immunity,[16/] federalism, comity, and equity suggest that they should not be.

A federal court exercising its inherent equitable powers in a civil contempt proceeding should not treat as illusory actual limitations placed on the party before it by the state's constitution and other laws that delay compliance. To do so is fundamentally unfair to the individuals involved. Here,

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16/ See generally Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984).

two of the petitioners, the directors of the May and Austin Units of Boston State Hospital, were held in contempt and fined even though they have no control over the state budgetary system. While the petitioner Commissioner plays some role in that process, it is very limited and he did all within his power. Even if he had had within his fiscal year 1987 operating budget enough money to pay the judgment, A. 98, his doing so would have violated state law and subjected him personally to criminal penalties. A. 31.

Alternatively, if it was proper for the court of appeals to treat the individual petitioners as one and the same as the non-party Commonwealth for purposes of civil contempt, the court of appeals' use of the "impossibility" test and finding of contempt was an error of

law because it ignored principles espoused by this Court in Hutto v. Finney, 437 U.S. 673 (1978), and Edelman v. Jordan, 415 U.S. 651 (1974). Rather, it should have applied a "good faith" test, that is, whether reasonable, diligent, and good faith efforts were made to comply with the May 7, 1987 order. See generally fn. 14, supra.

In Hutto, this Court, said that the Eleventh Amendment does not bar a civil contempt fine or an award of attorney's fees (under common law) against a state official who is found to have acted in bad faith. Hutto, supra, 437 U.S. at 689-93.[17/] Moreover, this Court warned

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17/ The Court distinguished Edelman, supra, by reasoning that such a fine or an award is "ancillary" to prospective injunctive relief rather than being retroactive money relief barred by the Eleventh Amendment. Id. at 695 n. 24.

that in such a case the Eleventh Amendment may require a federal court to act with moderation and with deference to the state's budgetary process. Thus, where the court award is so large or so unexpected that it interferes with the state's budgetary process, the Eleventh Amendment "may counsel moderation in determining the size of the award or in giving the state time to adjust its budget before paying the full amount of the fee. Cf. Edelman v. Jordan, 415 U.S. 651, 666 n.11 . . . ." 437 U.S. at 692 n.18 (emphasis added). See also Hutto, 437 U.S. at 697 n.27, 708 (Powell, J., concurring), 715 (Rehnquist, J., dissenting).

Here, the court of appeals conceded "good faith," yet dismissed it as a defense. It similarly failed to act with any deference or moderation with respect

to the state's budgetary process. Eleventh Amendment considerations, as well as considerations of comity and equity, are especially important in a situation such as this where compliance with the court's order to pay 1.47 million dollars within forty-five days involved a cumbersome, multi-faceted process dictated by a state's constitution and statutes, and requiring action by many different individuals. Satisfaction of the judgment was treated as a matter of the highest priority by the executive branch (including by officials who were not parties). The Legislature did not act intransigently by not singling out the judgment for priority in advance of other weighty and pressing public concerns; it was merely trying to balance the Commonwealth's many needs and obligations.

The important question of federal law presented here, that is, what standards are state officials (and states) held to in civil contempt proceedings in federal court, and the Eleventh Amendment, federalism, comity, and equity concerns it subsumes, should be addressed by this Court for the benefit not only of Massachusetts and its officials, but for that of all state officials and state governments in the United States. Every state and every state official faces liability for attorney's fees judgments entered by federal courts under 42 U.S.C. § 1988 and other federal fee-shifting statutes, as well as for other federal court judgments against state officials sued in their official capacity. As here, the judgment can be sizeable and have a significant impact on the state's

budget. If every federal court from which a judgment arose decided, as the court of appeals here did, to deny a stay pending appeal and order payment within forty-five days and then to hold state officials in contempt and impose fines despite their diligent and good faith efforts, the state law restrictions on their authority and power, and the state's budgetary process and other needs and obligations, it could wreak havoc.

Therefore, this Court should grant the petition to settle this issue and correct the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Date: November 3, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 86-1777

RUBIE ROGERS, ET AL.,
Plaintiffs, Appellees,

v.

ROBERT OKIN, ET AL.,
Defendants, Appellants.

Before
Coffin, Bownes and Selya,
Circuit Judges.

ORDER OF COURT

Entered July 6, 1987

Plaintiffs move for an order holding defendants and the Commonwealth of Massachusetts in civil contempt. The history of this case having been duly recorded elsewhere,[1/] we recount

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1/ See Rogers v. Okin, No. 86-1777, slip op. (1st Cir. June 12, 1987) and cases cited id. at n.1.

only the information basic to our ruling on the motion before us.

On June 27, 1986 the district court ordered defendants to pay plaintiffs $1,467,242.43 in costs and attorneys' fees under 42 U.S.C. §1988. On March 31, 1986 defendants requested this court to stay the district court's order pending resolution of the appeal. In considering the motion, we took into account the important competing interests at stake: the Commonwealth's administrative problems in obtaining timely appropriation of the substantial sum, the plaintiffs' interest in obtaining the use and value of the monetary award (or so much thereof as might be confirmed on appeal), and the public interest both in retaining any money to which the Commonwealth is entitled and in avoiding substantial

chilling effect on potential civil rights attorneys. In an effort to accommodate these interests, we indicated that we would grant the requested stay if the Commonwealth would agree to pay postjudgment interest on the award. The defendants refused this proposed accommodation. On May 7, 1987, we denied the motion for a stay and ordered defendants to pay plaintiffs the full amount of the attorneys' fees and costs award on or before June 15, 1987. We fashioned an escrow-type arrangement in order to safeguard the defendants' rights. We cautioned that "[s]hould payment not be made by that date, defendants risk contempt and a substantial penalty for every day's delay beyond June 15, 1987."

On June 12, 1987 we issued our opinion reducing the award of attorney's

fees and costs to $870,503.37. After plaintiffs' June 18, 1987 Motion for Reconsideration brought to light a mathematical error in our original calculations, we amended the award to total $975,503.37. Though our opinion vacated the judgment and remanded the matter to the district court for entry of an order consistent with our opinion, we maintain jurisdiction over the case until mandate issues.

Defendants having failed to comply with this court's May 7, 1987 order -- having failed to pay plaintiffs any part of the attorneys' fees and costs award or to inform plaintiffs when or if the award will be paid -- plaintiffs now seek enforcement by means of an order holding defendants and the Commonwealth in civil contempt. Defendants admit, as they must, that they are in violation

of our May 7th order, but argue that a finding of contempt would be inappropriate because (1) they and other Commonwealth officials have diligently sought to obtain legislative appropriation, and (2) they lack authority to pay the judgment absent such appropriation, which, due to the Commonwealth's "cumbersome" legislative appropriation process, will occur no sooner than July 15, 1987.

We recognize and appreciate the good faith efforts made by several Commonwealth officials to comply with the May 7th order, but good faith is not a defense to civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Fortin v. Commissioner of Massachusetts Department of Public Welfare, 692 F. 2d 700 (1982).

Impossibility -- proof that the party being coerced by the court order lacks the power to comply with it -- is a defense to contempt, but the defense is not available in the context of this case. First, it is not at all clear to us that defendants have met their burden of proving that they and other executive officials have done all that they could have done to obtain timely legislative appropriation. Defendants have not indicated, for example, that any serious effort was made to urge the executive branch to submit an expedited single item appropriation request to the legislature as opposed to merely requesting that the appropriation occur with the next regularly scheduled supplemental budget. The fact that some efforts to obtain the funds were made does not prove that further efforts

would have been fruitless. See, e.g., Fortin, 692 F.2d at 797.

More fundamentally, it is far too late in the day to pretend that a state and its officials sued in their official capacities are completely separate entites for purposes of paying section 1988 awards. Indeed, it is only because they are viewed as one entity for purposes of a section 1988 award that the defendant officials named in this case could have successfully asserted the commonwealth's Eleventh Amendment immunity to an award of prejudgment interest. Congress specifically anticipated that in section 1988 suits against state officials, "the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control

or from the State . . . government (whether or not the agency or government is a named party)." S. Rep. No.1011, 94th Cong., 2d Sess. reprinted in 1976 Code Cong. & Ad. News 5908, 5913. Recognition of the impossibility defense advanced by defendants would render enforcement of section 1988 awards against state officials impossible, since it is inevitably the case that the state legislatures and not the named officials control the state purse strings.

Defendants have not argued that the Commonwealth is insolvent or that it would have been impossible for the Commonwealth to have appropriated sufficient funds in time to enable its officials to comply with this court's order. Indeed, a year has passed since the district court first ordered

payment. Because we view the named defendants in this case and the Commonwealth as a single entity, we reject defendants' impossibility defense.

The Commonwealth has recently informed us that in the event defendants' violation of our May 7, 1987 order continues beyond August 6, 1987, the administration will request from the legislature a supplemental appropriation for the payment of interest running from August 6th to the date of payment at the August 6th federal statutory rate. Plainly, the Commonwealth offers too little too late to extricate defendants from an adjudication of civil contempt. Because the Commonwealth has shown a willingness to pay postjudgment interest on the money it owes plaintiffs, however, we deem it equitable to give

defendants another chance to remedy the situation.

If, within two weeks of the date of this order, the Commonwealth agrees to pay the plaintiffs interest at the federal statutory rate on the attorneys' fees and costs award running from June 15, 1987 to the date of payment, then this court will not find defendants in contempt. Absent timely notification of such an agreement by a written assent filed with the clerk of this court within two weeks of the date of this order, this court will hold defendants in civil contempt for violating our May 7, 1987 order. Though that order technically remains in effect we now amend it, reducing the amount defendants must pay plaintiffs for attorneys' fees

and cost from the $1,467,242.43 awarded by the district court to the $975,503.37 upheld on appeal.

Because defendants have already violated one order of this court and because plaintiffs suffer irreparable harm for each day's delay in payment, it is clear that we must do more than express hope for compliance with our order. Accordingly, in the event defendants choose not to avoid a finding of contempt, they are hereby fined $300 for each day's delay in payment beyond the June 15, 1987 deadline, such fine to be paid to plaintiffs for their attorneys. See Hutto v. Finney, 437 U.S. 678, 690 (1978)("If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring

compliance."); Fortin, 692 F.2d. at 797-98. We will hold mandate and maintain jurisdiction until we rule otherwise.

By the Court:

FRANCIS P. SCIGLIANO, CLERK

By:_____
Chief Deputy Clerk

Cert. cc: U.S.D.C. of Massachusetts and Honorable Joseph L. Tauro; cc: Ms. Durrell and Messrs. Cole and Simonds

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1777

RUBIE ROGERS, ET AL.,

Plaintiffs, Appellees,

v.

ROBERT OKIN, ET AL.,
Defendants, Appellants.

Before

Coffin, Bownes and Selya, Circuit Judges

MEMORANDUM AND ORDER

Entered: May 7, 1987

After a lengthy and complex civil rights trial and subsequent trial on attorneys' fees and costs, the district court ordered the defendants in this case, the Massachusetts Commission of Mental Health and various officials and staff members of Boston State Hospital, to pay plaintiffs $1,470,000 in attorneys' fees and costs under 42

U.S.C. § 1988. The defendants now request that this Court stay enforcement of that judgment pending appeal under Federal Rule of Appellate Procedure 8 (b).

Defendants argue that a stay is appropriate because (1) defendants face logistical problems in obtaining speedy legislative appropriation of such a substantial sum; (2) execution of the judgment could interfere with orderly administration of the Commonwealth' treasury and budget; (3) the taxpayers and public benefit recipients of the Commonwealth have an interest in the Commonwealth's retention of any money which this Court might determine was improperly awarded to plaintiffs; and (4) the plaintiffs are secure in the sense that the Commonwealth is less likely than a private litigant to

deplete its assets or to become insolvent.

While we respect all of these concerns, we must also consider the important interests that could be violated by our granting of the requested stay. First, granting the stay could cause plaintiffs to suffer an irreparable loss of money rightfully theirs. The Supreme Court's recent decision in Library of Congress v. Shaw, 106 S. Ct. 2959 (1986), may require us to reconsider the appropriateness of an award of post judgment interest under section 1988 against a state defendant. If we were to grant the Commonwealth's request for a stay of judgment pending appeal, and subsequently uphold at least a substantial part of the attorneys' fee award to plaintiffs but determine that the Commonwealth was immune from an

award of postjudgment interest, then plaintiffs would have irrevocably lost the use and value over time of that portion of the monetary award to which they were adjudged entitled. Second, and even more important, granting the requested stay could also violate the public interest, for the result described above could well have a chilling effect on other potential civil rights attorneys.

Prior to opposing the defendants' motion for a stay in the district court, the plaintiffs informed the defendants that they would not oppose a stay if the Commonwealth would agree to pay the judgment plus interest upon resolution of the appeal. The Commonwealth refused. In an effort to accommodate all of the important interests involved, we also indicated that we would grant

the requested stay if the commonwealth would waive any sovereign immunity it might have to postjudgment interest. Indeed, the Massachusetts Appeals Court in Gaulin v. Commissioner of Public Welfare, 23 Mass. App. Ct. 744 (1987), held that the Commonwealth was not immune from postjudgment interest. Since the Commonwealth has now informed us that it will not waive any immunity to postjudgment interest, and in fact is seeking review of Gaulin by the Supreme Judicial Court, it is apparent that we connot maintain the status quo or adequately protect the rights and interest as stake in this case unless we deny the defendants' motion for a stay of judgment pending appeal.

Recognizing the legitimate interests of all parties, we therefore order that: (1) The motion is denied. (2)

The defendants shall pay to the plaintiffs the full amount of the judgment for attorneys' fees and costs in a form approved by the district court on or before June 15, 1987. (3) Should payment not be made by that date, defendants risk contempt and a substantial penalty for every day's delay beyond June 15, 1987. (4) In order to secure prompt restitution to defendants in the event that a final order does not affirm the total amount of the district court's judgment, plaintiffs, upon payment of the judgment by defendants, shall post a $470,000 bond with the clerk of the district court before distributing the remaining award among their various counsel. In the event that restitution in an amount greater than the bond amount is ordered, plaintiffs' counsel would be held

responsible for the amount exceeding the bond.

By the Court:

Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RUBIE ROGERS, et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	CA No. 75-1610-T
	*	
ROBERT OKIN, et al.,	*	
	*	
Defendants.	*	

ORDER

TAURO, D.J. February 18, 1987

It is hereby ordered as follows:

1. Defendants' Motion for a Stay Pending Appeal is denied;

2. Defendants' Motion for an Order Regarding Post-Judgment Interest is premature and, therefore, is denied wothout prejudice.

United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.

42 U.S.C. § 1988

In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, the court . . . may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs.

Constitution Of Massachusetts, Declaration Of Rights, Article XXX

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Constitution of Massachusetts, Amendment Article 63

Section 2. Within three weeks after the convening of the general court the governor shall recommend to the general court a budget which shall contain a statement of all proposed expenditures of the commonwealth for the fiscal year,

including those already authorized by law, and of all taxes, revenues, loans and other means by which such expenditures shall be defrayed . . . For the purpose of preparing his budget, the governor shall have power to require any board, commission, officer or department to furnish him with any imformation which he may deem necessary.

Section 3. All appropriations based upon the budget to be paid from taxes or revenues shall be incorporated in a single bill which shall be called the general appropriation bill . . . The governor may at any time recommend to the general court supplementary budgets which shall be subject to the same procedure as the original budget.

Section 4. After final action on the general appropriation bill or on

recommendation of the governor, special appropriation bills may be enacted

. . . .

Constitution of Massachusetts Pt. 2 c. 2, § 1, Art. 11

No moneys shall be issued out of the treasury of this commonwealth, and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council . . . agreeably to the acts and resolves of the general court.

Massachusetts General Laws Annotated c. 7, § 3

The executive office for administration and finance shall serve as the principal agency of the executive department of the government of the commonwealth for the following purposes:

(1) Developing, co-ordinating, administering and controlling the

financial policies and programs of the commonwealth . . . .

Massachusetts General Laws Annotated c. 29, § 1

As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:

"Appropriation", the authorization by the general court with the approval of the governor . . . of the expenditure of state revenues from a specified sum for a specified purpose to a specified maximum amount for a specified period of time . . .

"Budget Director", the administrative head of the budget bureau . . . within the executive office of administration and finance . . .

"Commissioner", the commissioner of

administration as provided for in section four of chapter 7 . . .

"Secretary", the officer in charge of each executive office . . .

"State Agency", a state agency . . . department . . . of the commonwealth . . . .

Massachusetts General Laws Annotated c. 29, § 3

Every officer having charge of any state agency which receives a periodic appropriation from the commonwealth . . . shall annually, on or before a date set by the commissioner [of administration and finance] submit to the budget director . . . (4) estimates of the amounts required for the ordinary maintenance for the ensuing fiscal year . . . .

Massachusetts General Laws
Annotated c. 29, § 6

The budget director shall study and review all estimates and requests for appropriations and other authorizations for expenditures of state funds filed with him . . . and shall make such investigations as will enable him to prepare an operating budget for the governor, setting forth such recommendations as the governor shall determine. . . The operating budget shall embody all estimates, requests and recommendations for appropriations, distributions of state revenues and other authorizations for expenditures by the commonwealth in accordance with existing law . . . as submitted by each officer having charge of any state agency which receives a periodic appropriation from the commonwealth . . . .

Massachusetts General Laws
Annotated c. 29, § 7H

The governor shall submit to the general court annually within three weeks after the general court convenes in regular session a budget including an operating budget . . . The governor . . . from time to time during the session of the general court may submit supplemental messages or recommendations relative to appropriations . . . .

Massachusetts General Laws
Annotated c. 29, § 26

Expenses of offices and departments for compensation of officers . . . shall not exceed the appropriations made therefor by the general court or the allotments made therefor by the governor. No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the

appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth nor shall any liablility be imposed upon the commonwealth. . . .

Massachusetts General Laws Annotated c. 29, § 27

Notwithstanding any provision of general law, no department, office, commission and institution shall incur an expense . . . unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made. Appropriations by the general court, and any allotments by the governor, shall be expended only in the amounts prescribed in the subsidiary accounts, if any, established for the several appropriation accounts in schedules

established by, and on file with, the joint committees on ways and means. . . .

Massachusetts General Laws Annotated c. 29, § 63

If a department, commission, board, officer, employee or agent of the commonwealth is about to expend money or incur obligations purporting to bind the commonwealth for any purpose or object or in any manner other than that for and in which such department, commission, board, officer, employee or agent has the legal and consitutional right and power to expend money or incur obligations, the supreme judicial or superior court may . . . determine the same in equity, and may before the final determination of the cause, restrain the unlawful exercise or abuse of such right and power.

Massachusetts General Laws
Annotated c. 29, § 66

Any officer or employee who knowingly violates, authorizes or directs another officer or employee to violate any provision of this chapter, or any rule or regulation promulgated thereunder, or any other provision of law relating to the incurring of liability or expenditure of public funds, shall be punished by a fine of not more than one thousand dollars or by imprisonment in a jail or house of correction for not more than one year, or both.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RUBIE ROBERS, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 75-1610-T
ROBERT OKIN, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

The defendants move, pursuant to Fed. R. Civ. P. 62(d), for an order staying, pending appeal, this Court's order of June 27, 1986, awarding some $1,467,242 in attorneys' fees and costs to the plaintiffs. The defendants filed a notice of appeal on July 25, 1986. The present motion is brought at this time because the defendants have been informed that the plaintiffs will seek

to execute on the judgment pending appeal unless a stay is granted.

As grounds for this motion, the defendants state:

1. The appeal in this case involves difficult and important issues of fact and law. The defendants have a likelihood of succeeding, at least partially, in their appeal;

2. It is impossible for the defendants (i.e. the Department of Mental Health of the Commonwealth of Massachusetts) to file a supersedeas bond with this Court at this time in order to obtain an automatic stay under Fed. R. Civ. P. 62(d) or to pay the judgment at this time because the money to do so must be appropriated by the Legislature.

3. In lieu of posting a bond or paying the judgment, the defendants

offer the Affidavit of Stephen W. Kidder which demonstrates the solvency of the Commonwealth.

4. There is no demonstrable substantial harm that will occur to the plaintiffs or other interested parties if a stay were granted pending appeal. However, if a stay were not granted, the public interest of the citizens and the taxpayers of the Commonwealth would be harmed.

In support of this motion, the defendants file herewith the Affidavit of Stephen W. Kidder and a Memorandum.

The defendants request oral argument and estimate a total of 30 minutes would be needed.

WHEREFORE, the defendants respectfully request that this Court

stay its order dated June 27, 1986, pending appeal.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Suzanne E. Durrell
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
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Date: October 23, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RUBIE ROGERS, et al., Plaintiffs, v. ROBERT OKIN, et al., Defendants.	CIVIL ACTION NO. 75-1610-T

DEFENDANTS' MOTION FOR AN ORDER REGARDING POST-JUDGMENT INTEREST

The defendants hereby move this Court to enter an order that post-judgment interest does not apply to the award of attorneys' fees and costs made in this Court's order of June 27, 1986 pursuant to 42 U.S.C. § 1988.

As grounds for this motion, the defendants say as follows.

1. 42 U.S.C. § 1988 makes no reference to interest, and this Court's June 27, 1986 judgment pursuant to

§ 1988 makes no reference to interest. However, the plaintiffs' attorneys have informed undersigned defendants' counsel that it is plaintiffs' position that post-judgment interest applies.

2. The defendants, as part of the Commonwealth of Massachusetts, are immune from an award of post-judgment interest in federal court by virtue of the Commonwealth's immunity under the Eleventh Amendment to the United States Constitution.

3. Defendants have appealed from this Court's order of June 27, 1986, and the record is now fully assembled and was filed with the Court of Appeals on November 25, 1986. Consideration of the post-judgment interest question at this stage should avoid unnecessary delay in the final resolution of this case by enabling any appeal from this Court's order to be consolidated with the pending appeal.

In support of this motion, the defendants file herewith a memorandum of law.

The defendants request oral argument on this motion and estimate that 15 minutes per side would be adequate.

WHEREFORE, the defendants respectfully request that this motion be allowed.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

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(617) 727-1010

Dated: December 4, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RUBIE ROGERS, et al.	)	
Plaintiffs-Appellees,	)	
v.	)	NO. 86-1777
ROBERT OKIN, et al.,	)	
Defendants-Appellants.	)	

MOTION OF DEFENDANTS-APPELLANTS
FOR A STAY PENDING APPEAL

The defendants-appellants move pursuant to Fed. R. App. P. 8 for an order staying, pending appeal, the District Court's order of June 27, 1986, awarding some $1,467,242 in attorney's fees and costs to the plaintiffs. The defendants filed a notice of appeal from that order and oral argument in this Court is scheduled for April 7, 1987.

The defendants filed a motion for a stay in the district court but it was denied without opinion.

As grounds for this motion, the defendants state:

1. The appeal in this case involves difficult and important issues of fact and law. The defendants have a likelihood of succeeding, at least partially, in their appeal;

2. It is impossible for the defendants (i.e. the Department of Mental Health of the Commonwealth of Massachusetts) to file a supersedeas bond with the district court at this time in order to obtain an automatic stay under Fed. R. Civ. P. 62 (d) or to pay the judgment at this time because the money to do so must be appropriated by the Legislature of the Commonwealth of Massachusetts. See Affidavit of Stephen W. Kidder.

3. In lieu of posting a bond or paying the judgment, the defendants offer the Affidavit of Stephen W. Kidder which demonstrates the solvency of the Commonwealth.

4. There is no demonstrable substantial harm that will occur to the plaintiffs or other interested parties if a stay were granted pending appeal. However, if a stay were not granted, the public interest of the citizens and the taxpayers of the Commonwealth would be harmed.

In support of this motion, the defendants attach hereto a copy of the the Affidavit of Stephen W. Kidder filed in the district court and submit herewith a Memorandum.

WHEREFORE, the defendants-appellants respectfully request that this Court stay the district court's order dated June 27, 1986, pending appeal.

By their attorneys,

JAMES M. SHANNON
Attorney General

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One Ashburton Place, Room 2019
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Dated: March 31, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RUBIE ROGERS, et al. Plaintiffs, v. ROBERT OKIN, et al., Defendants.	)	CIVIL ACTION NO. 75-1610-T

AFFIDAVIT OF STEPHEN W. KIDDER

I, Stephen W. Kidder, being duly sworn, depose and say as follows.

1. Since about January, 1985, I have been General Counsel to the Executive Office of Administration and Finance of the Commonwealth of Massachusetts. Under Mass. G.L. c. 7, § 3, the Office of Administration and Finance is responsible, among other things, for "developing, co-ordinating, administering and controlling the financial policies and programs of the

commonwealth," and "supervising the organization and conduct of the business affairs of the departments . . . within the executive department of the government of the commonwealth." The Budget Bureau is part of the Office. Pursuant to G.L. c. 29, § 6, the Bureau prepares, under the supervision of the Office, any budget to be submitted to the Massachusetts Legislature by the Governor.

2. The Commonwealth's fiscal year runs from July 1 to June 30. Usually the general budget for the coming fiscal year is enacted by the Legislature near the end of June of the existing fiscal year. The fiscal year 1986 budget was enacted on July 3, 1986, and signed by the Governor on July 10, 1986. See c. 206 of the Acts of 1986. That budget does not include an appropriation to pay the district court judgment (dated June

27,1986) in this case. As a result, to pay that judgment the Department of Mental Health must seek an appropriation and the Legislature must appropriate the money.

3. The Commonwealth is solvent. On September 10, 1986, the Office of Administration and Finance estimated the fiscal year 1986 net, unappropriated surplus at 540.7 million dollars. Out of this amount, the Legislature has authorized the transfer of 235 million dollars to pension reserve funds, leaving a balance carried forward into fiscal year 1987 of 305.7 million dollars.

Signed under the pains and penalties of perjury this 23rd day of October, 1986.

STEPHEN W. KIDDER

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RUBIE ROBERS, et al. Plaintiffs-Appellees, v. ROBERT OKIN, et al., Defendants-Appellants.	)	NO. 86-1777

MEMORANDUM IN SUPPORT OF MOTION
FOR A STAY PENDING APPEAL

INTRODUCTION

Federal Rules of Civil Procedure, Rule 62(d), provides for an automatic stay of a money judgment pending appeal where the appealing party posts a supersedeas bond for the amount of the judgment plus interest and costs. See also United States District Court for the District of Massachusetts, Local

Rule 33. In addition, this Court (acting pursuant to Fed. R. App. P. 8(b)) and the district courts have the discretion to grant a stay when a bond for a lesser amount is offered, when alternate security in lieu of a bond is offered, or even when no security is offered. See, e.g., Poplar Grove Planting and Refinishing Company v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979); Federal Prescription Services, Inc. v. American Pharmaceutical Association, 636 F.2d 755, 757-60 (D.C. Cir. 1980) and authorities cited. Where the appealing party has a reasonable likelihood of success on appeal or there are serious and difficult issues raised, and where the balance of harm to the judgment debtor and the public interest outweighs that to the judgment creditor

or other interested parties, a stay pending appeal should be granted. Laurenzo By Laurenzo v. Mississippi High School Activities Association, 708 F. 2d 1038, 1042 (5th Cir. 1983); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Martinez Bodriquez v. Jiminez, 537 F.2d 1 (1st Cir. 1976); Evans v. Buchanan, 435 F. Supp. 832, 841-49 (D. Del. 1977). See also Edelman v. Jordan, 414 U.S. 1301 (1973); King v. Smith, 88 S. Ct. 842 (1986) (where state's arguments were not frivolous and presented substantial legal question and where judgment would require state to pay out substantial sums of money which could never be recovered if the judgment ultimately were reversed, a stay was granted). Cf. Constructors Association of Western Pennsylvania v. Kreps, 573

F.2d 811, 815 (3d. Cir. 1978) (standards for issuance of preliminary injunctive relief).

In the present case there are serious and difficult issues raised on appeal and the defendants have a reasonable likelihood of succeeding, at least partially, in their appeal. See Brief and Reply Brief of Defendants-Appellants. It is impossible for the defendants (i.e. the Department of Mental Health) to post now a supersedeas bond for the full amount of the judgment (some $1,467,242), plus costs, interest, etc., or to pay the judgment now since the money to do so must be appropriated by the Legislature of the Commonwealth. See Massachusetts Constitution, Amendments, Articles 62 and 84 ("The Commonwealth may give, loan or pledge its credit only by a vote

. . . of . . . the general court . . ."); Affidavit of Stephen W. Kidder. In the absence of a stay, the defendants risk contempt of court even though they have no control over payment of the judgment. The Commonwealth is solvent, see Kidder Affidavit, therefore, the plaintiffs have adequate security for the judgment. Since there is no danger of the status quo being irreparably impaired if a stay is granted, a stay pending appeal should be granted.

ARGUMENT

A. The Appeal Raises Serious and Difficult Issues.

The degree of likelihood of success on the merits of an appeal that must be shown by the party moving for a stay has been a subject of mild disagreement among the federal courts. See Resident

Advisory Board v. Rizzo, 429 F. Supp. 222, 224 n.1 (E.D. Pa. 1977). Some courts have required a "strong showing" of probable success, Martinez Rodriquez, supra, 537 F.2d at 2, Reserve Mining Co. v. United States, 498 F.2d 1073, 1076-66 (8th Cir. 1974), application denied, 419 U.S. 802 (1974), while others require that serious and difficult legal issues be raised on appeal. Laurenzo, supra, 708 F.2d at 1042; Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra, 559 F.2d at 844-45; Evans v. Buchanan, supra, 435 F. Supp. at 843-44.[1/]

1/ In the related context of the requirement of likelihood of success on an application for preliminary injunctive relief, some courts require a "reasonable probability of success," Constructors Association of Western Pennsylvania, supra, 573 F.2d at 815, Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.29 917, 919-20 (3d Cir. 1974).

There are several reasons for employing a flexible standard by which the court determines the necessary degree of probability of success on the merits in light of its assessment of the other significant factors affecting the granting of a stay, namely, the balancing of harms to the parties. See, e.g., King, supra, 88 S. Ct. 843; Edelman, supra, 414 U.S. 1301; Laurenzo, supra 708 F. 2d at 1042; Holiday Tours, Inc., supra, 559 F.2d at 834-44. Cf. Constructors Association of Western Pennsylvania, supra, 573 F.2d. at 815 (preliminary injunction).

First, the nature of the relief sought by a request for a stay pending appeal is preventative -- its purpose is to maintain the status quo until an appellate court determines whether the trial court's decision is correct.

E.g., Holiday Tours, Inc., supra, 559 F.2d at 844.

Second, Fed. R. App. P. 8 requires that motions for stays pending appeal must ordinarily be made in the first instance to the district court, yet prior recourse to the trial court would be an unnecessary and fruitless endeavor if the district court had to concede that it had made an erroneous decision before granting a stay. Presumably such a standard would result in consistent refusals to grant stays pending appeal despite the effect of other factors on the balance of equities. Evans, supra, 435 F. Supp. at 843. Armstrong v. O'Connell, 416 F. Supp. 1325, 1325-30 (E.D. Wis. 1976), quoting from Friends of the Earth v. Armstrong, 360 F. Supp. 165, 196 (D. Utah 1973), vacated on other grounds, 485 F.2d 1 (10th Cir.

1973), cert. denied, 414 U.S. 1171 (1974), rehearing denied, 416 U.S. 952 (1974). (Rule 62 does "'not intend that the district court may refuse to stay its order upon precisely the same grounds as those on which it issued the order.'") As the United States Court of Appeals for the District of Columbia said:

> Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

Holiday Tours, Inc., supra, 559 F.2d at 844-45. Accord Evans, supra, 435 F. Supp. at 843-44.

Common sense leads one to conclude that the probability of success standard should not require the moving party to heft the impossible burden of convincing the trial court, after its full consideration of the case on the merits, that its decision was wrong. Nor does it make sense for an appellant to have to convince an appellate court which is not yet familiar with the merits that the district court was wrong. Rather, a far more reasonable approach would be to grant a stay when the appeal raises serious and difficult questions and when the balance of harm in the absence of a stay tilts in the direction of the moving party. Laurenzo, supra, 708 F. 2d at 1042; Holiday Tours, supra, 559 F.2d at 844; Evans, supra, 435 F. Supp. at 844. See also Davis v. Reagan, 485 F. Supp. 1255, 1263-64 (S.D, Iowa 1980);

Jordan v. Wolke, 463 F. Supp. 641, 642 (E.D. Wis. 1978). This standard allows the district court to take a fresh look at the issues which it has just decided, and the appellate court to avoid deciding the merits prematurely.

As the parties' lengthy briefs filed in this Court demonstrate,[2/] this case raises serious and difficult issues of law and fact including, among others, whether the plaintiffs were "prevailing parties" for purposes of 42 U.S.C. § 1988, what is the reasonable number of hours (out of some 11,000 hours claimed) to be compensated, especially in view of the lack of contemporaneous time records

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2/ Also, this Court has allowed the parties twenty-five minutes each for oral argument on April 7, 1987.

for about one-third of the time claimed,[3] what is the reasonable hour rate(s), and whether a downward adjustment in the lodestar award was required because the plaintiffs only partially prevailed. The sheer magnitude of the plaintiffs' fee request[4] and the district court's award makes the issues difficult, as does the fact that the law in this area is relatively young and the appropriate standards are constantly evolving. See, e.g., Commonwealth of Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart,

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3/ That this issue is serious and difficult and involves evolving standards is also demonstrated by this Court's recent decision in Calhoun v. Acme Cleveland Corp., 801 F.2d 558 (1st Cir. 1986).

4/ They requested some 2.7 million dollars.

461 U.S. 424 (1983); Calhoun v. Acme Cleveland Corp., 801 F.2d 558 (1st Cir. 1986); Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984). In addition to raising serious issues on appeal, the defendants have a reasonable likelihood of succeeding, at least partially, on their appeal, for the reasons stated in their brief and reply brief filed with this Court.

B On Balance, The Harm To The Defendants And The Public Interest Outweighs Any Harm To The Plaintiffs.

If the requested stay is not granted, the defendants (i.e. Department of Mental Health) risk an execution by the plaintiffs unless the Legislature appropriates the money to the judgment. In the event the Legislature appropriates the money, even though an

appeal is pending and no final judgment is entered, that money will be unavailable for use by the Commonwealth or the Department of Mental Health for other purposes, thus possibly harming the taxpayers and government benefit recipients, among others. Furthermore, if the money is appropriated and then paid to the plaintiffs' attorneys, and the final judgment after appeal is for an amount less than the district court's judgment, the Commonwealth would be in the position of having to try to recover that money from the plaintiffs' attorneys. Since Greater Boston Legal Services, like the Department of Mental Health, is dependent in large part on appropriations for its funding, there will be no guarantee as to when the Commonwealth will be paid back. Stahlin & Bergstresser is a small law firm.

There is also no guarantee it could repay the money promptly.[5/]

The Commonwealth is solvent. Kidder Affidavit. The Legislature has honored attorney's fees judgments in the past and there is no evidence to expect it would not do so in this instance. To put the Department in the position of paying the judgment or risking an execution when the judgment is not final and serious legal questions are raised on appeal, obviously would interfere with the orderly administration of the Commonwealth's treasury and budget as well as raise serious separation of

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5/ In that instance, the plaintiffs should be required to post a bond to secure their obligation to make prompt restitution to the Commonwealth in the event of a final order that does anything other than affirm in total the district court's judgment. See Howard v. Phelps, 443 F. Supp. 374, 377 (E.D. La. 1978); Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977).

powers problems. As such, it is unwarranted. See, e.g., Edelman v. Jordan, 414 U.S. 1301 (1973); King v. Smith, 88 S. Ct. 842 (1968) (stays granted pending appeal because of the public interest in preserving the integrity of state treasuries.).

The purpose of requiring a bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal, and to secure the judgment debtor against the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal. Federal Prescription Services, supra, 636 F.2d at 760; Poplar Grove, supra, 600 F.2d at 1190-91. Where these dual goals can be accomplished without the posting of a bond, a district court has the discretion to waive the bond requirement

or to fashion an alternative security. Id. Under Fed. R. App. 8(b), this Court also has the discretion not to require a bond (or any security) or to require an alternative security. The bond requirement has been waived in many cases. For example, in Thom v. Aggrey, 455 F. Supp. 1, 8-9 (N.D. Ohio 1977), appeal dismissed, 595 F.2d 1225 (6th Cir. 1979), the court waived the requirement of a bond on an attorney's fees award of $4395, even though the defendants had been less than co-operative throughout the litigation, because the court had no reason to believe its order would not be complied with at the end of the case. In Federal Prescription Services, supra, 636 F.2d 755, a stay of a damages award of $102,000 was granted where the documented net worth of the judgment

debtor was about forty-seven times the amount of the award and there was no indication that the debtor would try to avoid paying at the end of the case. In Pawlak v. Greenawalt, 111 L.R.R.M. 3071 (M.D. Pa. 1982) (copy attached), a stay was granted without the posting of security for a judgment of some $38,000 in attorney's fees and costs because the judgment debtor's net worth exceeded the amount of the judgment and it would remain solvent pending appeal. In the present case, it is not only unnecessary, but impossible, for the Department to post a bond. Therefore, the requirement should be dispensed with.

The defendants expect the plaintiffs to argue that a stay should not be granted because there is a risk that post-judgment interest will not apply to the judgment and, if so, that will harm

them. The defendants took the position in the district court that post-judgment interest does not apply to an award of attorney's fees against the Commonwealth under 42 U.S.C. § 1988. Cf. Library of Congress v. Shaw, 106 S. Ct. 2957 (1986)(federal government immune from an award of interest on attorney's fees judgment under Title VII). However, the district court denied the defendants' motion for an oroer regarding post-judgment interest on the ground that it was premature. The issue of post-judgment interest should not affect the outcome of the present motion since it is speculative for several reasons to conclude at this point that the plaintiffs will suffer any substantial harm.

First, the law on the issue of post-judgment interest is unsettled.

Compare Library of Congress v. Shaw (federal government immune from interest on award of attorney's fees under Title VII) with Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982), Morrow v. Finch, 642 F.2d 823 (5th Cir. 1981), and Preston v. Thompson, 565 F. Supp. 294 (N.D. Ill. 1983)(post-judgment interest applies to attorney's fees awards against state under 42 U.S.C. § 1988). Therefore, the plaintiffs may prevail on that issue.

Second, Fed. R. App. P. 37 provides that "If a judgment is modified or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to the allowance of interest." So, even if applicable, post-judgment interest in this case may run from the date of this Court's rescript rather than from

June 27, 1986, thus obviating any harm to the plaintiffs.

Third, while the case itself is over ten years old, and the plaintiffs' attorneys have had to wait some time for an attorney's fees award, the district court's order of June 27, 1986 compensated for that delay and reduced any harm to the plaintiffs by awarding to them current hourly rates.

Given all of these contingencies, the question of post-judgment interest is not an appropriate factor to be considered in determining whether to grant the present motion for a stay pending appeal.[6/]

6/ The plaintiffs may propose that the money be placed in an escrow account, thus obviating the need for the plaintiffs to post a bond, see fn. 5, supra, and reducing any harm to them in the event it is ultimately decided that post-judgment interest does not apply. However, even in that case the

Since the equities tilt in favor of the defendants and the public interest, a stay should be granted.

CONCLUSION

For the reasons discussed herein, the defendants respectfully request that the district court's judgment of June 27, 1986, be stayed pending appeal.

By their attorneys,

JAMES M. SHANNON
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(footnote continued)

plaintiffs would be entitled to interest earned on that account only to the extent they are entitled to post-judgment interest. See International Telemeter v. Hamlin International Corp., 754 F.2d 1492 (9th Cir. 1985).

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

RUBIE ROBERS, et al.	)	
Plaintiffs-Appellees	)	
v.	)	NO. 86-1777
ROBERT OKIN, et al.,	)	
Defendants-Appellants	)	

OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR A STAY PENDING APPEAL AND MOTION TO ORDER FEE AWARD TO BE PLACED IN INTEREST-BEARING ESCROW ACCOUNT AS A CONDITION OF THE DEFENDANTS' APPEAL.

The plaintiffs-appellees in the above-entitled action oppose the Motion of Defendants-Appellants for a Stay Pending Appeal of the District Court's judgment relating to an award of attorneys fees and costs to the plaintiffs, entered on June 27, 1986.

The plaintiffs request that this court deny Defendants-Appellants Motion. Furthermore, the plaintiffs request that this Court order that the Commonwealth pay within forty-five days all fees and costs awarded by the District Court, as a condition of the appeal in the above-entitled case. The plaintiffs further move that the payments be placed into a Court-monitored, interest bearing escrow account, not to be distributed until the expiration of all appeals, or earlier, as this Court shall order.[1/]

In opposition to the motion for a Stay Pending Appeal, the Plaintiffs-

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1/ To the extent that this Court affirms the District Court award (or any portion thereof), the plaintiffs would seek payment of the escrow funds as affirmed, plus accumulated interest, ratable to said funds, in addition to any other funds to which the plaintiffs were lawfully entitled at the time.

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

RUBIE ROBERS, et al.	)	
Plaintiffs-Appellees	)	
v.	)	NO. 86-1777
ROBERT OKIN, et al.,	)	
Defendants-Appellants	)	

OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR A STAY PENDING APPEAL AND MOTION TO ORDER FEE AWARD TO BE PLACED IN INTEREST-BEARING ESCROW ACCOUNT AS A CONDITION OF THE DEFENDANTS' APPEAL.

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In opposition to the motion for a Stay Pending Appeal, the Plaintiffs-

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1/ To the extent that this Court affirms the District Court award (or any portion thereof), the plaintiffs would seek payment of the escrow funds as affirmed, plus accumulated interest, ratable to said funds, in addition to any other funds to which the plaintiffs were lawfully entitled at the time.

Appellees state the following:

Prior to opposing the defendants' Motion for a Stay in the District Court, the plaintiffs communicated to the defendants a willingness to not oppose a stay if the Commonwealth would agree to enter into a written agreement to pay the judgment plus statutory interest upon resolution of the appeals. The defendants refused this offer and the plaintiffs therefore notified the defendants that they would seek to execute on the judgment, unless a stay was issued.

Under Rule 62(d) of the F.R.C.P., the defendants can seek to obtain a stay of execution pending appeal, if they post a supercedeas bond in this Court. "Such a supercedeas bond is a privilege extended to the judgment debtor as a

price of interdicting the validity of an order to pay more." Poplar Grove Planting and Refining Co., Inc. v. Bache, Halsey Stuart, Inc., 600 F. 2d 1189, 1191 (5th Cir. 1979).

This Court has the authority to set the amount of the bond in an amount which will permit satisfaction of the judgment in full, with costs, interest and damages for delay. Wright & Miller, Federal Practice & Procedure, §2905, at p.328 (1973); Ivor B. Clark Co. v. Hogan, 296 F.Supp. 407, 409, 412 (S.D. N.Y. 1969); Poplar Grove Planting and Refining Co., Inc. v. Bache, Halsey Stuart, Inc., supra.

However, a stay granted contingent on the posting of a supercedeas bond would be inappropriate if the posting of the bond fails to guarantee that the plaintiffs will not suffer any monetary

losses pending resolution of all appeals, including any loss of post-judgment interest. See Poplar Grove Planting and Refining Co., Inc. v. Bache, Halsey Stuart, Inc., supra; and Dayton Christian Schools v. Ohio Civil Rights Commission, 604 F.Supp. 101,105 (S.D. Ohio, 1984), reversed on other grounds, 766 F.2d 932 (6th Cir. 1985).

Without the posting of a supercedeas bond, a stay of execution may be granted only if the party seeking a stay can establish a substantial likelihood of success on appeal, irreparable harm if the stay is denied, absence of or relatively slight harm to the opposing party caused by the issuance of a stay, and that it is in the public interest to grant the stay. See Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979); See also

Edelman v. Jordan, 414 U.S. 1301, 94 S.Ct. 13, 38 L.Ed. 2d 15 (1973) (Rehnquist, C.J.; as Circuit Judge). See also Instrumentalist Co. v. Marine Corps League, 509 F.Supp. 323, 341-342 (N.D. Ill., 1981); Wright and Miller; Federal Practice and Procedure: Civil §2904 at p. 316 (1973).

The defendants are unable to establish that they satisfy any of the four legal requirements for this Court to grant a stay of execution. The plaintiffs, in this memorandum, however, will focus their argument on the fact that the defendants can neither establish the absence of a harm to the plaintiffs if a stay is granted, nor establish irreparable harm to themselves if a stay is denied.

The defendants assert in a memorandum filed with the District Court

on December 4, 1986, that they are not legally responsible for the payment of interest on the judgment entered on June 27, 1986, maintaining that since the Commonwealth did not expressly waive their sovereign immunity as to post-judgment interest, the Commonwealth is immune from the payment of such interest. The defendants relied on a recent Supreme Court case, Library of Congress v. Shaw, _____U.S. _____, 106 S. Ct. 2957 (1986) for support for this position. Although Library of Congress v. Shaw, supra, involves a case in which it was held that pre-judgment interest cannot be recovered in a claim for attorneys fees against the federal government in a Title VII case, the de-fendants assert that the same principle applies to post-judgment interest in an attorney's fee claim

against the Commonwealth, based on 42 U.S.C. §1988.

The plaintiffs believe there is a significant risk that the plaintiffs will be unable to recover statutory interest for the period of June 27, 1986 through the completion of all appeals on the fee claim. Thus, there is a significant risk the plaintiffs will lose a substantial sum of money if the stay is granted. The defendants cite to three cases in their memorandum at page 11 to support their suggestion that the plaintiffs have some likelihood to prevail on this claim. However, all three cases cited to by the defendants were decided before Library of Congress v. Shaw, and none addressed a claim of sovereign immunity as a bar to post-judgment interest.

In addition, according to the

defendants, even if plaintiffs succeed on appeal and execute on the judgment, the defendants will need to seek a legislative appropriation to satisfy the judgment. This is often a very timely process. It is not fair for the plaintiffs to have to wait an additional significant amount of time after the appeals are completed to receive their compensation. This delay in payment would be particularly prejudicial to the plaintiffs if the defendants are correct in their assertion that they are not responsible for any post-judgment interest, no matter how long it takes before the appeals are completed and before the legislature appropriates the money to satisfy the judgment.

Furthermore, there would be no incentive for the Commonwealth's speedy resolution of payments through

legislative appropriation, if no interest is due on the outstanding judgment. "It would be anomalous to permit the State in effect to reduce the award by withholding payment for a considerable time." Spain v. Mountanos, 690 F.2d 742, 748 (9the Cir. 1982).

Upon information and belief, there is presently a substantial state surplus. However, no one is able to speculate what the Commonwealth's economy will be in a year to three years from this date. The plaintiffs do not want to be in a situation in which the Commonwealth had a deficit or limited funds and argues that it would have to appropriate money from other state programs or that they are unable to convince the legislature to appropriate the funds because of the state of the Commonwealth's treasury.

There would be no prejudice to the defendants from this Court denying the Defendants' Motion for a Stay Pending Appeal and ordering the Commonwealth to place the money to satisfy the judgment in an interest bearing escrow account. If the defendants succeed in having the appellate court reduce or even eliminate the attorney fee and cost award, they may recover all the principal with interest from the escrow account.[2/]

2/ The defendants rely on one case, International Telemeter v. Hamlin International Corp., 754 F.2d 1492 (9th Cir. 1985) for the proposition that plaintiffs would only be entitled to interest from an interest bearing escrow account to the extent plaintiffs are entitled to post-judgment interest. However, in that case, the Court relied on the fact that the escrow account was established upon the agreement of the parties, and not by the Court. id. at 1495. The Court indicated that its decision would have been different if the lower court had ordered the judgment satisfied, and then ordered an escrow account to be established. id. at 1495.

The Commonwealth argues that they can demonstrate good cause for the issuance of a stay, and that they can guarantee that they will have the financial means to cover any final judgment on fees and costs. Thus, the Commonwealth maintains that this Court should use its discretionary power to grant a stay, without requiring a supercedeas bond and without ordering the money placed in an interest-bearing escrow account. See for e.g., Federal Prescription Services, Inc., v. American Pharmaceutical Ass'n., 636 F.2d 755, (D.C. Cir., 1980); see also Poplar Grove Planting and Refining Co., Inc. v. Bache, Halsey, Stuart, Inc., supra.; Thom.

However, the above cases and the cases cited in defendants' memorandum only apply to the circumstances in which the status quo is preserved and in which

the appealing party's rights are thoroughly protected pending appeal. they do not involve the circumstances, as in this case, where there is a significant risk the status quo will not be preserved pending resolution of all appeals. In this case there is a significant risk that the plaintiff-appellees will suffer financial harm from the failure to obtain post-judgment interest based on a claim of sovereign immunity. See Federal Prescription Services v. American Pharmaceutical Ass'n., supra, 636 F. 2d at p.760. This risk is present unless the Commonwealth agrees to waive its sovereign immunity claim as to post-judgment interest. Even the posting of a supercedeas bond will not protect the plaintiffs and preserve the status quo pending resolution of the

case on appeal unless the Commonwealth waives its claim of sovereign immunity.

The issue of whether the Commonwealth is able to satisfy the final judgment in this case is not the real issue in determining whether a stay is appropriate. What is a primary issue is the significant risk of financial harm to the plaintiffs if a stay is granted. There is the additional risk that legislative delay in appropriating the money to satisfy the judgment may cause the plaintiffs to await a substantial additional period after resolution of all appeals before being able to actually execute on the judgment. Considering the already eleven years this case has been litigated, it is inequitable to require the plaintiffs to wait any longer to

execute on their judgment than is absolutely necessary.

Furthermore, the defendants argued at page 11 of their memorandum that harm to the plaintiffs will be obviated, since interest may "run from the date of this Court's rescript," is incorrect, unless the Commonwealth voluntarily waives its sovereign immunity. If sovereign immunity is applicable to the District Court judgment, it is also applicable from the date this Court issues its mandate.

Since the defendants are unable to show that substantial harm would not come to plaintiffs if a stay is granted, particularly the loss of post-judgment interest, until the appellate process is completed, their request for this Court to apply its discretionary power to grant a stay should be denied. See Marr

v. Lyon, 377 F.Supp. 1146, 1148 (W.D. Oklahoma, 1974). When considering the balancing of hardships it should again be noted that the defendants may recoup all funds placed in a court monitored escrow account, including the ratable amount of interest on these funds, if they succeed on any portion of their appeal to reduce or limit plaintiffs' fee award.3/

For the reasons stated above, this Court should deny the Motion of Defendant-Appellants for a Stay Pending

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3/ If the defendants are correct in arguing that the plaintiffs would only be entitled to interest earned on that account to the extent they are entitled to post judgment interest, defendants should then be ordered to pay plaintiffs the amount of the judgment and order the plaintiffs to post a bond to secure their obligation to make prompt restitution to the Commonwealth in the event a final order does not affirm the total amount of the District court's judgment. See Nicodemus v. Chrysler Corp., 445 F. Suppl. 559,560 (N.D. Ohio 1977).

Appeal of this Court's June 27, 1986 judgment relating to attorneys fees and costs.

Furthermore, this Court should order judgment paid in full by the Commonwealth and order the money awarded for attorneys fees and costs be placed in an interest bearing escrow account with the proceeds to be distributed upon the expiration of all appeals, or earlier, as this Court shall order.

Richard W. Cole
Stahlin and Bergstresser, Inc.
52 Temple Place
Boston, Massachusetts 02111
(617) 5421-4365

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
John W. McCormack State Office Building
One Ashburton Place
Boston, MA 02108-1698

April 17, 1987

BY HAND

Francis P. Scigliano
Clerk
United States Court of Appeals
for the First Circuit
1606 John W. McCormack Post
Office and Courthouse
Boston, Massachusetts 02109

Re: Rubie Rogers, et al. v. Robert Okin, et al. Appeals Court No. 86-1777

Dear Mr. Scigliano:

As promised in our letter to you of April 9, 1986, the parties are reporting back to the Court on settlement.

The parties' attorneys met this week to explore the possibility of settling the case. They were not able to reach a settlement.

The Attorney General's office has informed the plaintiffs that the

Commonwealth will not waive its immunity from post-judgment interest. The Commonwealth will be filing on or before April 21, 1987 an application for leave to obtain further appellate review of the decision of the Massachusetts Appeals Court in Gaulin v. Commissioner of Public Welfare, 23 Mass. App. Ct. 744 (1987).

Thank you.

Sincerely yours,

Suzanne E. Durrell
Assistant Attorney General

Richard Cole, Esq.

cc: Marshall Simonds, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RUBIE ROGERS, et al.	)	
Plaintiffs-Appellees,	)	
v.	)	NO. 86-1777
ROBERT OKIN, et al.,	)	
Defendants-Appellants.	)	

PLAINTIFFS MOTION FOR COURT ORDER HOLDING DEFENDANTS IN CIVIL CONTEMPT

The plaintiffs hereby move for an order holding the defendants and the Commonwealth of Massachusetts in civil contempt. In support of this motion the plaintiffs state that:

(1) This Court, in an order dated May 7, 1987, ordered that "[t]he defendants shall pay to the plaintiffs the full amount of the judgment for attorneys' fees and costs in a form

approved by the District Court on or before June 15, 1987."

(2) The defendants have not paid the plaintiffs any portion of the judgment for attorneys' fees or costs.

(3) After numerous status calls by the plaintiffs' counsel to the Attorney General's Office, on June 5, 1987, the plaintiffs were finally informed by defendants' counsel, Suzanne Durrell, that the earliest that the Commonwealth would be likely to honor this Court's order would be sometime after July 15, 1987.

(4) It is anticipated that the legislature will approve a final supplemental appropriation on or about July 15, 1987. The Attorney General's office has informed plaintiffs' counsel Clyde Bergstresser that only if the legislature approves the appropriation

of attorneys' fees and costs as part of that supplemental appropriation will payment be made.

(5) Plaintiffs have not been advised by the defendants as to how long it would be from the date of appropriation until the date of payment.

(6) Plaintiffs have not been advised by the defendants what funds presently exist within the Department of Mental Health or in other Departments of the Commonwealth to pay the judgment.

(7) The defendants have not offered to pay the plaintiffs post-judgment interest during any additional period of delay in payments.

(8) On June 12, 1987, this Court issued its decision relating to the plaintiffs' attorney fees and costs petition. This Court ordered that plaintiffs be awarded $870,503.37 in

fees and costs. The defendants have not paid the plaintiffs even this amount by June 15, 1987.

(9) Defendants are aware that, as a result of their sovereign immunity claim, for each day's delay in payment, the plaintiffs suffer irreparable and significant monetary loss.

(10) This Court, in its order of May 7, 1987, stated that, "[s]hould payment not be made by that date, defendants risk contempt and substantial penalty for every day's delay beyond June 15, 1987."

(11) In the interests of justice the plaintiffs request that this Court hold the defendants and the Commonwealth of Massachusetts in civil contempt and order the defendants to pay a

substantial penalty for every day's delay in payment beyond June 15, 1987.

By plaintiffs' attorneys,

_____

Richard W. Cole

_____

Clyde D. Bergstresser
Stahlin and Bergstresser, Inc.
52 Temple Place
Boston, Massachusetts 02111
542-4365

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RUBIE ROGERS, et al.,	)	
Plaintiffs-Appellees	)	
v.	)	CIVIL ACTION
	)	No. 86-1777
ROBERT OKIN, Commissioner of Mental Health, et al.,	)	
Defendants-Appellants	)	

DEFENDANTS' RESPONSE TO
PLAINTIFFS' CIVIL CONTEMPT MOTION

The defendants admit that they have not paid the judgment for attorneys' fees and costs in this case. However, they respectfully submit that a finding of contempt is not warranted or appropriate in this case. As explained below, the defendants are unable to pay

the award without prior action by the Governor and the Legislature. Defendants have acted promptly and diligently to ensure that those predicate actions are taken.

1. We first note as background the requirements of the Massachusetts Constitution which limit the authority of state officials, such as the Commissioner of Mental Health in this case, in fiscal matters. The state Constitution, like its federal counterpart, embodies the principle of separation of powers. See Art. 30 of the Declaration of Rights; Opinion of the Justices, 369 Mass. 990, 992 (1976). This principle applies specifically to the appropriations process, which is specified in amend. art. 63 of the Constitution:

"Fundamental in our system of government is the principle that the power of appropriation lies exclusively in the legislative branch." Opinion of the Justices, 375 Mass. 851, 853 (1978), citing Opinion of the Justices, 375 Mass. 827, 833 (1978), Baker v. Commonwealth, 312 Mass. 490, 493 (1942), Opinion of the Justices, 308 Mass. 601, 614 (1941), and Opinion of the Justices, 302 Mass. 605, 612 (1939).

"The Legislature exercises this power by setting apart from public revenues a specific amount of money to be used by officers of the executive branch for particular purposes to implement and maintain programs the Legislature has established." Id., citing Opinion of the Justices, 375 Mass. 827, 833 (1978); Opinion of the

Justices, 297 Mass. 577, 580-81 (1937). The power of appropriation is the authority "to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other." Opinion of the Justices, 323 Mass. 764, 766 (1948) (citations omitted); Opinion of the Justices, 375 Mass. 827, 833 (1978); Opinion of the Justices, 373 Mass. 911, 914 (1977).

The submission of a budget request to the Legislature is the Governor's constitutional duty and prerogative; it is not within the authority of the Commissioner of Mental Health (or other other, less senior defendants). All requests for appropriations must be

channelled from the Commissioner through the Secretary of Human Servcies, to the Secretary of Administration and Finance, who by statute (Mass. Gen. Laws Ann. c. 7, § 3; c. 29, § 3) has the responsibility of preparing budget requests on behalf of, and at the direction of, the Governor.

Under amend. art. 63, § 2, the Governor is required to submit a comprehensive budget proposal each January for the fiscal year which commences the upcoming July 1; this is a massive and complex document, to which the Legislature devotes considerable attention over a period of months in an effort to enact the budget by June 30. The general appropriations act for Fiscal Year 1987 (which ends June 30, 1987) was enacted in early July, 1986,

as c. 206 of the 1986 laws. A perusal of that law will reveal that it contained no appropriation for the payment of the attorneys' fee award in this case.[1/] In response to ¶ 6 of the present motion, therefore, no funds exist which are available to pay the judgment. The funds appropriated by the general appropriation act (St. 1986, c. 206) are all appropriated for particular purposes; and there is no general appropriation for the payment of judgments against the Commissioner of

---

1/ Nor could it have, in light of the chronology; the award was not entered until June 27, after the bill had been enacted by both the Senate and the House and been sent to a Conference Committee, a stage at which the introduction of new items was impermissible.

Mental Health.[2/]

Under amend. art. 63, § 4, the Governor may submit supplemental or deficiency budgets during the course of the fiscal year; in recent years, to avoid a proliferation of budget requests to the Legislature, the Governor has adopted a practice of accumulating requests from various state agencies and submitting only two such budgets during the entire year, one in the winter and the second in the spring. This year,

---

2/ Even if the Commissioner had some discretion to satisfy such claims out of his operating budget, something which he has never done, that budget is substantially depleted at this time when the fiscal year is about to expire. We also assume the Court would agree that funds necessary for serving Department of Mental Health clients during the remainder of this fiscal year should not, as a matter of public policy be diverted to pay the judgment in this case.

the Governor submitted his first supplemental budget in March, and the second one on May 29, 1987.

2. We now set forth the specific steps taken to comply with this Court's Order of May 7, 1987, which was received on May 8, a Friday. The following Monday, May 11, the Secretary of Administration and Finance wrote to the Chairmen of the House and Senate Ways and Means Committees, alerting them to this Court's Order and specifically requesting that an appropriation for the purpose of satisfying the judgment be enacted in time to permit payment by June 15. See Attachment "A". Two weeks later the Governor, in his second supplemental budget request to the Legislature for the current fiscal year, specifically included a request for an

appropriation in the amount of the judgment. See Attachment "B". Secretary Keefe thereafter renewed his request for prompt action in a letter of June 11. See Attachment "C". This was followed up by phone calls to the appropriate legislative officials by the Budget Director (see Mass. Gen. Laws Ann. c. 7, § 4B), who was assured that this request was likely to be acted upon favorably by both the Senate and House Ways & Means Committees in the next supplemental appropriation on which they act. See Attachment "D". Thus, the satisfaction of this judgment in response to this Court's order has been treated as a matter of the highest priority by the executive branch, even though none of those officials beyond the Commissioner is a defendant in this case.

3. The months of May and June are the busiest months of the legislative year in Massachusetts. In addition to a rush to enact general legislation before the summer recess, the Legislature is engaged in the process of weighing and debating the budget for the next fiscal year, which typically includes public policy initiatives of great importance. This year is no exception. The Legislature is considering, e.g., whether to revamp the state courts, how much to raise welfare benefits, and whether to appropriate $370 million for capital improvements for facilities (including Boston State Hospital) within the Department of Mental Health (a matter in which the plaintiffs presumably have some interest). It does not belittle the importance of the

attorneys' fees award in this case, or of the Court's Order, that the Legislature has not singled it out for priority in advance of these other weighty and pressing public concerns. On the other hand, there is no reason to believe that the Legislature is not prepared to honor the judgment and to enact the appropriation as part of the supplemental budget which was submitted by the Governor on May 29. The problem is simply that the Legislature apparently intends to address the Commonwealth's annual operating budget first, as it is already dangerously close to the June 30 deadline. It is because of this scenario, that we do not except the supplemental appropriation containing the monies for the satisfaction of the judgment in this

case to be enacted until around July 15.

4. In the ordinary course, it takes about six weeks for the issuance of a check after the enactment of an appropriation for that purpose. In light of this Court's Order, however, the defendants will make every effort to expedite that process, which requires processing a warrant through the State Comptroller's office, once the appropriation in this case is enacted. We can assure the Court that a check will be delivered to the plaintiffs' counsel no later than seventeen days after the date of the appropriation.[3/]

3/ As with many of plaintiffs' assertions in their Contempt Motion, we are uncertain as to the substance of any conversation they may have had on this subject with the Assistant Attorney General handling the appeal, since she is on her honeymoon.

5. The defendants urge this Court that, at least at this time, in light of the facts set forth above, a finding of contempt is neither warranted nor appropriate. The executive branch has responded to the Court's Order with the utmost diligence and good faith. There is no reason to believe that the Legislature will not do the same. Attorneys' fees awards have never been the subject of contention in the Legislature; we are unaware of any instance in which they have not been honored by the enactment of an appropriation in the ordinary course. Unfortunately, the Legislative appropriations process is somewhat cumbersome, and not geared to giving priority to unique, individual situations such as this one; but the

Legislature is not singling out this appropriation for delay or otherwise acting intransigently.[4/]

6. An order of civil contempt is appropriate "only when it appears that obedience is within the power of the party being coerced by the order." Maggio v. Zeitz, 333 U.S. 56 (1948), quoted in Badgley v. Santacroce, 800 F.2d 33, 36 (2d Cir. 1986). That defense to contempt applies to the defendants in this case. As set forth

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4/ The Attorney General is keenly aware of the importance of expediting payment of attorneys' fees awards and other judgments. In consultation with the Comptroller and the Office of Administration and Finance, we have been exploring over the past several months ways of accomplishing this through improved administrative procedures and legislation aimed at eliminating the need for special appropriations. An outside section in the pending annual budget bill would, if enacted, authorize and require the Comptroller to issue regulations as part of this process.

above, they lack the authority to pay this judgment in the absence of a legislative appropriation, and they have sought such an appropriation with diligence in response to this Court's Order. They certainly stand in no worse position than did the Governor in Brewster v. Dukakis, 675 F.2d 1 (1st Cir. 1982).

7. Finally, we briefly address the perception of "entrenched partisan advocacy" expressed in this Court's June 12 decision at 7, out of a concern that it might color consideration of the contempt motion. It is true that the attorneys' fees claim, like the underlying case, was vigorously contested. But that claim was for $2.7 million, and not to have contested it vigorously would have been

irresponsible. Moreover, the plaintiffs took what in our experience was an unusually aggressive approach to an attorneys' fees case. This office handles several hundred such claims annually, and is able to settle the vast majority of them; the rest normally are resolved by routine briefing in the trial court. In short, that the attorneys' fees claim in this case turned into "a second major litigation" should not be taken as reflecting intransigence on the part of the defendants. We regret that the greater part of our efforts on appeal apparently irritated this Court; whatever the deficiencies of presentation, however, we believed the arguments to be merited, and the detail called for, by this Court's earlier decisions.

8. Finally, we note that the District Court has yet to approve a form of judgment as directed by this Court's Order. We presume that, in light of this Court's June 12 decision, both that form and the appropriation which the defendants are seeking should reflect this Court's reduction of the award to $870,503.37.

Respectfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL

H. Reed Witherby
Assistant Attorney General
Room 2019
One Ashburton Place
Boston, Massachusetts 02108
617-727-1020

Date: June 19, 1987

"A"

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR
ADMINISTRATION AND FINANCE
State House, Boston 02133

May 11, 1987

The Honorable Patricia McGovern,
Chairman
Senate Ways and Means Committee
State House, Room 2112
Boston, MA 02133

Chairman
House Ways and Means Committee
State House, Room 238
Boston, MA 02133

Dear Chairmen:

I am writing to request your assistance in securing an appropriation of $1,470,000 to pay a federal district court judgment in the case of Rogers v. Okin.

This case involved the department of mental health's policies and procedures regarding the administration of antipsychotic medication. Judgment on

attorney's fees and costs in the amount of $1,470.000 was awarded by the district court and the Commonwealth has appealed the judgment in the United States Court of Appeals for the First Circuit. In addition, the Commonwealth sought a stay of the judgment during the pendency of the appeal.

As the attached order indicates, the First Circuit has denied the Commonwealth's request for a stay and has ordered that the judgment be paid prior to June 15, 1987. In the event that payment is not made by that date, the First Circuit has stated that the Commonwealth will risk contempt proceedings and a substantial penalty for every day's delay beyond June 15.

I am writing to urge that you include a special appropriation for this purpose in the first available

supplemental budget. Please take all steps possible to ensure that the judgment can be paid prior to June 15, 1987.

Very truly yours,

Frank T. Keefe

FTK/np

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1777

RUBIE ROGERS, ET AL.,

Plaintiffs, Appellees,

v.

ROBERT OKIN, ET AL.,
Defendants, Appellants.

Before

Coffin, Bownes and Selya, Circuit Judges

MEMORANDUM AND ORDER

Entered: May 7, 1987

After a lengthy and complex civil rights trial and subsequent trial on attorneys' fees and costs, the district court ordered the defendants in this case, the Massachusetts Commission of Mental Health and various officials and staff members of Boston State Hospital, to pay plaintiffs $1,470,000 in attorneys' fees and costs under 42 U.S.C. § 1988. The defendants now request that this Court stay enforcement of that judgment pending appeal under

Federal Rule of Appellate Procedure 8 (b).

Defendants argue that a stay is appropriate because (1) defendants face logistical problems in obtaining speedy legislative appropriation of such a substantial sum; (2) execution of the judgment could interfere with orderly administration of the Commonwealth' treasury and budget; (3) the taxpayers and public benefit recipients of the Commonwealth have an interest in the Commonwealth's retention of any money which this Court might determine was improperly awarded to plaintiffs; and (4) the plaintiffs are secure in the sense that the Commonwealth is less likely than a private litigant to deplete its assets or to become insolvent.

While we respect all of these concerns, we must also consider the

important interests that could be violated by our granting of the requested stay. First, granting the stay could cause plaintiffs to suffer an irreparable loss of money rightfully theirs. The Supreme Court's recent decision in Library of Congress v. Shaw, 106 S. Ct. 2959 (1986), may require us to reconsider the appropriateness of an award of post judgment interest under section 1988 against a state defendant. If we were to grant the Commonwealth's request for a stay of judgment pending appeal, and subsequently uphold at least a substantial part of the attorneys' fee award to plaintiffs but determine that the Commonwealth was immune from an award of postjudgment interest, then plaintiffs would have irrevocably lost the use and value over time of that portion of the monetary award to which they were adjudged entitled. Second,

and even more important, granting the requested stay could also violate the public interest, for the result described above could well have a chilling effect on other potential civil rights attorneys.

Prior to opposing the defendants' motion for a stay in the district court, the plaintiffs informed the defendants that they would not oppose a stay if the Commonwealth would agree to pay the judgment plus interest upon resolution of the appeal. The Commonwealth refused. In an effort to accommodate all of the important interests involved, we also indicated that we would grant the requested stay if the commonwealth would waive any sovereign immunity it might have to postjudgment interest. Indeed, the Massachusetts Appeals Court in Gaulin v. Commissioner of Public Welfare, 23 Mass. App. Ct. 744 (1987),

held that the Commonwealth was not immune from postjudgment interest. Since the Commonwealth has now informed us that it will not waive any immunity to postjudgment interest, and in fact is seeking review of Gaulin by the Supreme Judicial Court, it is apparent that we connot maintain the status quo or adequately protect the rights and interest as stake in this case unless we deny the defendants' motion for a stay of judgment pending appeal.

Recognizing the legitimate interests of all parties, we therefore order that: (1) The motion is denied. (2) The defendants shall pay to the plaintiffs the full amount of the judgment for attorneys' fees and costs in a form approved by the district court on or before June 15, 1987. (3) Should payment not be made by that date, defendants risk contempt and a

substantial penalty for every day's delay beyond June 15, 1987. (4) In order to secure prompt restitution to defendants in the event that a final order does not affirm the total amount of the district court's judgment, plaintiffs, upon payment of the judgment by defendants, shall post a $470,000 bond with the clerk of the district court before distributing the remaining award among their various counsel. In the event that restitution in an amount greater than the bond amount is ordered, plaintiffs' counsel would be held responsible for the amount exceeding the bond.

By the Court:

Clerk

"B"

HOUSE - No. 5625

2440-0974 For the payment of a certain court judgment entered in Middlesex superior court, civil action no. 81-287

$35,000

EXECUTIVE OFFICE OF HUMAN SERVICES
Office of the Secretary

4000-0100 Item 4000-0100 of said section is hereby amended by inserting after the words "bureau of transitional planning" the following:--; provided further, that certain prior year personnel expenses not to exceed nine hundred thirty-five dollars shall be allowed and paid from this item

4000-0999 For the payment of a certain court judgment entered in Suffolk superior court, civil action 32336

$381,752

4170-0400 $359,343

DEPARTMENT OF PUBLIC HEALTH

5011-0976 For the payment of a certain court order entered in the United States court of appeals for the first circuit, civil action number 86-1777

$1,470,000

5011-0977 For the payment of a certain settlement agreement entered in Hampshire superior court, civil action number 82-072

$225,000

5011-0978 For the payment of a certain court judgment entered in Hampden superior court, civil action number 86-651

$6,800

* * * *

"C"

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR
ADMINISTRATION AND FINANCE
State House, Boston 02133

June 11, 1987

The Honorable Patricia McGovern,
Chairman
Senate Ways and Means Committee
State House, Room 212
Boston, MA 02133

The Honorable Richard A. Voke,
Chairman
House Ways and Means Committee
State House, Room 238
Boston, MA 02133

Dear Chairmen:

I am writing to renew my request for a speedy appropriation of $1,470,000 to pay a federal district court judgment in the case of Rogers v. Okin.

Attached hereto is my letter dated May 11, 1987, in which I outlined for you the basis for the judgment and the

urgent need for appropriation prior to June 15, 1987.

A request for appropriation for this matter was also included in the deficiency budget filed by the Governor on May 29, 1987 (H. 5625).

Please call if you have any questions.

Very truly yours,

Frank T. Keefe

FTK/np

"D"

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR
ADMINISTRATION AND FINANCE
STATE HOUSE, BOSTON 02133

TO: Steve Kidder, Administration & Finance General Counsel

FROM: Barbara Salisbury, State Budget Director

DATE: June 12, 1987

RE: APPROPRIATION FOR ROGERS V. OKIN COURT JUDGMENT

Today I spoke with both Rick Lord, House Ways and Means Committee budget director, and Bruce Bullen, budget director for the Senate Ways and Means Committee, and reminded them of the need to appropriate $1.47 million prior to June 15, 1987 to pay a Federal District Court judgment in the case of Rogers v. Okin.

This was a deficiency recommendation that Frank Keefe had first written to

them about on May 11, 1987 and which the Governor had officially filed with the General Court on May 29. Secretary Keefe again wrote to the Ways and Means Committee Chairmen regarding this matter on June 11, 1987. Both budget directors felt that passage of a supplemental appropriation for this item would not be possible by June 15. However, they both assured me that they would include this $1.47 million judgment in the next supplemental appropriation on which they act.

BTS/mjj

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
John W. McCormack State Office Building
One Ashburton Place, Boston, 02108-1698

June 23, 1987

BY HAND

Francis P. Scigliano, Clerk
United States Court of Appeals
for the First Circuit
1606 U.S. Post Office & Courthouse
Boston, MA 02109

Re: Rogers v. Okin
No. 86-1777

Dear Mr. Scigliano:

In connection with the plaintiffs' Motion for Civil Contempt, I am authorized to represent to the Court as follows:

In the event that payment of the judgment for attorneys' fees and costs is not made by Thursday, August 6, 1987, the administration will request from the Legislature a supplemental appropriation for the payment of interest on the

judgment at the federal statutory rate as of August 6, 1987, from that date until the date of payment.

Assuming enactment in the ordinary course (around July 15) of the necessary appropriation for the payment of the judgment, August 6 is the day after the meeting of the Governor's Council at which the warrant for such payment likely would be approved on an expedited basis. Such approval is a constitutional prerequisite to payment. Mass. Const., Pt. 2, c. 2, § 1, art. 11.

In referring to the "judgment," we mean the judgment as modified by this Court in its June 12 decision ($870,503.37), or such other amount as may be determined by this Court upon reconsideration.

Please distribute the enclosed copies of this letter to the appropriate

judges. Thank you for your courtesy and cooperation in this matter.

Respectfully submitted,

H. Reed Witherby
Assistant Attorney General

HRW/sm
cc: Richard Cole, Esq.

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

RUBIE ROGERS, et al., Plaintiffs-Appellees	
v.	C.A. No. 86-1777
ROBERT OKIN, et al., Defendants-Appellants	

PLAINTIFFS' RESPONSE TO DEFENDANTS' OPPOSITION TO CIVIL CONTEMPT MOTION

The plaintiffs briefly respond to the defendants factual assertions presented in their Response to Plaintiffs' Civil Contempt Motion and address issues raised by defendants' submissions.

1. The plaintiffs have been informed that no supplemental budget was filed by the executive branch of the Commonwealth relating to the payment of plaintiffs' fees and costs until May

29th, 1987, twenty-one days after the Commonwealth received this Court's order. Defendants' memorandum at page four reflects this fact.

2. Upon information and belief, a request may be made at any time prior to the final passage of a supplemental deficiency budget, to amend the budget in order to include additional appropriations. Upon information and belief, the executive branch could have sought to amend its March budget request until at least June 2, 1987, so that the budget request would include the plaintiffs' fees and costs. Rather, the executive branch chose to include the fees and costs in the May 29, 1987 budget request. Upon information and belief, the March supplemental budget was not passed until on or about

June 9th, 1987. Upon information and belief, the defendants never sought an amendment of the March 1987 budget request to include the amount this Court ordered to be paid by June 15, 1987. The defendants' memorandum does not reflect that any attempt was made to seek an amendment of the March, 1987 budget proposal; after May 11th, 1987 and before the budget was finally passed.

3. Upon information and belief, bills have historically been filed in the legislature by the executive branch of the Commonwealth seeking single item and multiple item appropriations such as the payment of attorneys fees. Upon information and belief, the executive branch has filed single and multiple item appropriation requests in this session of the legislature. The fact

that the executive branch apparently voluntarily chose not to file a single item budget relating to the payment of plaintiffs' attorneys' fees should be considered by the Court to the extent this Court will determine whether the Commonwealth acted in good faith in making all possible efforts to comply with this Court's order.

4. Prior to the plaintiffs' filing of the Motion for Civil Contempt, the defendants never communicated to plaintiffs any intention to expedite payment after legislative appropriation.

5. In a two page letter submitted to this Court after the filing of the Motion for Civil Contempt, the defendants have indicated a willingness to waive sovereign immunity as to post-judgment interest, but only if

payment is not made by August 6th, 1987, and only for interest accruing thereafter. Plaintiffs first learned of this intention by a copy of the same letter. Plaintiffs question the Commonwealth's failure to waive their sovereign immunity claim retroactive to June 15, 1987, the date by which this Court ordered defendants to pay the fees and costs. The Commonwealth seeks to dictate when it will choose to comply with this Court's order and apparently argues that it should only by penalized if it does not comply with its own terms.

Date: June 24, 1987

By plaintiffs' attorney

Richard W. Cole
Stahlin and Bergstresser, Inc.
52 Temple Place
Boston, Massachusetts 02111
542-4365

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
John W. McCormack State Office Building
One Ashburton Place,
Boston, MA 02108-1698

June 25, 1987

BY HAND

Francis P. Scigliano, Clerk
United States Court of Appeals
for the First Circuit
1606 U.S. Post Office & Courthouse
Boston, MA 02109

Re: Rogers v. Okins, No. 86-1777

Dear Mr. Scigliano:

Although we normally would not file a second response on the matter, we feel constrained to correct a particularly serious inaccuracy in the plaintiffs' Response of June 24.

Contrary to the plaintiffs' assertion, the administration did seek to amend the March supplemental appropriation bill, and it did so on the first business day after receipt of this

Court's May 7 Order. The only method by which the executive can seek to amend a pending bill is by writing a letter to the appropriate committee requesting an amendment. That is what Exhibit A to the Defendants' Response is. In that letter, Secretary Keefe specifically urged the Chairman of the Ways & Means Committees to "include a special appropriation for this [case] in the first available supplemental budget."

Unfortunately, the Legislature apparently selected for the "first available supplemental budget," which it enacted in early June (St. 1987, c. 131), only emergency items necessary to enable state agencies to continue operating and rendering services during the remainder of the fiscal year. For example, the Governor's March supplemental contained requests for

appropriations for 49 judgments or settlements (some dating to July 1986); none of them was included in c. 131. We expect them to be included, along with the judgment in this case, in the next supplemental on or about July 15.

Please distribute the enclosed copies of this letter to the appropriate judges. Thank you for your courtesy and cooperation in this matter.

Respectfully submitted,

H. Reed Witherby
Assistant Attorney General

HRW/sm
cc: Richard Cole, Esq.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
John W. McCormack State Office Building
One Ashburton Place,
Boston, MA 02108-1698

July 20, 1987

BY HAND

Francis P. Scigliano, Clerk
United States Court of Appeals
1606 U.S. Post Office & Courthouse
Boston, MA 02109

Re: Rogers, et al. v. Okin, et al.
No. 86-1777

Dear Mr. Scigliano:

Pursuant to the Court's order entered July 6, 1987, in the above-entitled case, the Commonwealth hereby notifies the Court that it will not waive its immunity from post-judgment interest from June 15, 1987 to the date of payment.

In addition, the defendants wish to inform the Court that the Legislature of the Commonwealth passed the final

supplemental budget for fiscal year 1987 on July 16, 1987. That budget contains a $990,000 appropriation to pay the award of attorney's fees and costs in this case. That budget has not been signed yet by the Governor because he has been out-of-state. It is hoped that it will be signed by him tomorrow or Wednesday. Three checks totalling $975,503.37 have been drawn and they will be released and delivered to the plaintiffs' attorneys as soon as the budget is signed by the Governor.

The $300 per day fine imposed on the defendants by this Court's order entered July 6, 1987 will be paid to the plaintiff's attorneys, without prejudice, from the balance of the supplemental budget appropriation. It is expected that a check for the total amount of the fine (which cannot be

determined until the award of fees and costs is paid) will be issued and delivered to the plaintiffs' attorneys within seven to ten days of the payment of the award.

I am enclosing three copies of this letter in the event that its distribution is appropriate.

Thank you for your assistance.

Respectfully submitted,

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SED/mhf

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(2)

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
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NO. 87-848

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF MENTAL HEALTH AND THE DIRECTORS OF THE MAY AND AUSTIN UNITS AT BOSTON STATE HOSPITAL,

Petitioners,

v.

RUBIE ROGERS, HAROLD WARNER, ABLE BOLDEN, WILLIE WADSWORTH DONNA HUNT, AND JAMES COLLERAN,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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27 pp

QUESTIONS PRESENTED

I. Was it within the authority of the court of appeals to hold Massachusetts state officials in civil contempt where it was required to ensure payment of a district court judgment under 42 U.S.C. §1988, where the respondents were suffering irreparable financial harm from the delay in payment and where the court was not convinced that state officials had done all that could have been done to obtain timely legislative appropriation.

II. Was it within the authority of the Court of Appeals to hold state officials in civil contempt, where the petitioners position was that the federal court lacked power to ensure compliance with an attorneys fee award against the petitioners unless the state provided the means to enforce such judgment.

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OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
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STATEMENT OF THE CASE

Proceedings In the Lower Courts

On June 27, 1986 the United States District Court for the District of

Massachusetts entered a judgment against the petitioners awarding approximately 1.47 million dollars in attorneys fees and costs to the respondents pursuant to 42 U.S.C. §1988. Rogers v. Okin, 638 F.Supp. 934 (D. Mass. 1986).

On October 23, 1986, four months after judgment was entered, the petitioners filed a motion for a stay of the judgment in the district court, pursuant to Rule 62 of the Fed.R.Civ.P. (A.32-35). At the time of the filing of this motion, the petitioners had not made any effort to seek an appropriation from the legislature with which to pay the judgment. (A.49-50, 75-76, 109-111).

The respondents opposed the motion for a stay, arguing that because of the Commonwealth's assertion of sovereign immunity to post-judgment interest, the status quo would not be preserved pending resolution of all appeals on the

respondents' fee petition. Rather, respondents would suffer irreparable financial harm with each days' delay in payment of the fees and costs during the period of petitioner's appeal of respondents' fee claim. (A.68-84). (See also Note 5 at page 6 of petitioners' petition).

Prior to opposing the petitioners' motion for stay in the district court, the respondents communicated to the petitioners a willingness not to oppose a stay if the Commonwealth would agree to enter into a written agreement to pay the judgment plus statutory interest upon resolution of the appeal. The petitioners refused the offer and the respondents therefore notified the petitioners that they would seek to execute on the judgment, unless a stay was issued. (A.16,70).

The district court denied the Motion

for Stay on February 18, 1987. (A.20).

The petitioners filed a motion for a stay of judgment pending appeal in the court of appeals on March 31, 1987, almost one and a half months after the Motion for Stay was denied by the district court. (A.39-42). Again, the petitioners had not sought any appropriation from the legislature at the time it filed this stay motion (A.49-50, 75-76, 109-111).

The respondents again opposed this motion for a stay pending appeal and moved for an order directing payment. (A.68-84).

On April 7, 1987, the court of appeals heard argument on the petitioners' appeal from the district court judgment on fees and costs and on the motion for a stay. In the course of the argument, the court indicated that it would not use its discretionary power to grant a stay, because of the potential for irreparable financial harm to

the respondents, unless the petitioners agreed to waive its claim of sovereign immunity from post-judgment interest. (A.16-17, 85-86).

The petitioners notified the court of appeals that they would not waive their claim of sovereign immunity. On May 7, 1987, the court then denied the motion for a stay. (A.13-19, 85-86). The court also ordered that the full amount of the district court judgment of approximately 1.47 million dollars be paid in a form approved by the district court within forty-five (45) days; i.e., on or before June 15, 1987. (A.13-19). The court also stated that "[s]hould payment not be made on that date, defendants risk contempt and a substantial penalty for every day's delay beyond June 15, 1987." (A.18).

The order was based on the court's view that, due to the Commonwealth's refusal to

waive its immunity from post-judgment interest, the respondents would suffer an irreparable loss of money, rightfully theirs, by any delay in payment. (A.15-16). Secondly, the court held that granting the stay would violate the public interest since it "could well have a chilling effect on other potential civil rights attorneys". (A.16).

On June 12, 1987, the court of appeals vacated the district court's judgment, and reduced the district court's award of attorneys fees and costs to about eight-hundred seventy thousand ($870,000) dollars. Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987). Virtually the sole basis of the court of appeals' reduction of the fee award was it's reliance on this Court's reasoning in Library of Congress v. Shaw, ____ U.S. ____, 106 S.Ct. 2957 (1986). The court of appeals held that petitioners were immune

from an award of prejudgment interest under 42 U.S.C. §1988 and that, therefore, the district court's use of current hourly rates rather than historic rates was in error since it was equivalent to awarding prejudgment interest. Rogers v. Okin, supra, 821 F.2d at 26-28.

The respondents filed a motion for reconsideration, claiming mathematical error in the computation of the fee awarded pursuant to the court's June 12, 1987 decision and order. On July 2, 1987, the court of appeals, acting upon this motion for reconsideration, increased the judgment by some one-hundred five thousand ($105,000) dollars, to a total of about nine-hundred seventy-five thousand ($975,000) dollars.

By June 15, 1987, the money to pay the judgment had not been appropriated by the Massachusetts legislature.

It was not until May 29, 1987, eleven

months after the judgment was initially entered, that the Executive Branch first filed a supplemental budget relating to payment of the plaintiffs' fees and costs. (A.128-130).

Prior to June 15, 1987, the respondents had significant difficulties in obtaining information from the petitioners about whether and when payment would be made. It was only after numerous status calls to petitioners' counsel that the respondents were informed, on June 5, 1987, that the earliest the Commonwealth would be likely to honor the court of appeals order would be sometime after July 15, 1987. (A.88). Respondents were also informed that only if the legislature approved the appropriation of attorneys fees and costs would payment be made. (A.88-89). Respondents were never advised by the petitioners as to how long it would be from the date of appropriation

until the date of payment. (A.89). Nor did the petitioners offer to pay to respondents post-judgment interest during any additional period of delay in payment. (A.89).

As a result, on June 16, 1987, nearly a year after the award of attorney's fees and costs had been entered, the respondents filed with the court of appeals a motion for a court order holding the petitioners in civil contempt, and for an order for petitioners to pay a substantial penalty for every day's delay in payment beyond June 15, 1987. (A.90-91).

The petitioners opposed this motion, arguing that a finding of contempt was not warranted since they claimed they had acted promptly and diligently to obtain payment and that they lacked authority to pay the judgment absent such appropriation. (A.92-124). Only after the respondents filed their motion for civil contempt did

petitioners finally indicate any willingness to expedite payment after legislative appropriation. (A.103). Prior to the filing of this motion, the petitioners had never communicated to the respondents any intention or willingness to expedite payment after legislative appropriation. (A.131).

In response to the petitioners' opposition to the civil contempt motion, respondents stated that the petitioners had failed to present facts to demonstrate that they had acted with diligence. (A.128-132).

The court of appeals held that it was not convinced that the petitioners had met their burden of proving that all that could have been done was done to obtain timely legislative appropriation. (A.6-7).

Secondly, the court rejected petitioners' impossibility defense, since it viewed the named defendants and the Commonwealth as a single entity for purposes

of enforcement of a fee award judgment. (A.7-9). The court held that since the Commonwealth was not insolvent and the legislature could have appropriated the money by June 15, 1987, compliance was not impossible. (A.6-7). The court noted that "a year had passed since the district court first ordered payment". (A.8-9).

Notwithstanding the court's findings, it agreed not to hold the petitioners in civil contempt if the petitioners notified the court within two (2) weeks that it would pay the respondents interest at the federal statutory rate on the attorneys fees award running from June 15, 1987 to the date of payment. (A.10-12). The petitioners notified the court it would refuse to waive its immunity as to post-judgment interest. (A.136).

The Massachusetts legislature appropriated the money to pay the judgment

on July 16, 1987. Payment of the judgment was received on July 21, 1987. The contempt fine, totalling ten thousand five hundred dollars ($10,500), was paid on August 20, 1987.

REASONS FOR THIS COURT TO DENY CERTIORARI

I. The Decision Below Was Well Within The Proper Exercise Of The Lower Court's Judicial Authority.

A. The Lower Court had Sufficient Facts to Demonstrate that All Reasonable Steps to Obtain Payment Were Not Made.

In order to achieve compliance with its May 7, 1987 order, the court of appeals had no choice but to hold the petitioners in civil contempt. Although the court recognized that several Commonwealth officials had made good faith efforts to comply with the May 7th order, the court of appeals was confronted with facts which demonstrated that petitioners had failed to do "all that they could have done to obtain timely legislative appropriation." (A.6).

Where the respondents were suffering irreparable financial harm from the delay in payment and where the court was not convinced that state officials had done all

they could to obtain timely legislative appropriation, the court of appeals was within its authority to hold Massachusetts officials in civil contempt.

The court was aware that the petitioners had waited almost a full year from the date of the district court order, or from June 27, 1986 until May 29, 1987, before having a supplemental budget filed in the Massachusetts legislature. (A.98-99). The court was cognizant that the petitioners had apparently decided to ignore the judgment of the district court for this eleven month period.

Furthermore, the court of appeals was advised that the petitioners delayed until October 23, 1986, or almost four months after issuance of the judgment, before filing a motion for a stay in the district court. (A.32-34). The court was aware that the petitioners chose not to take any steps

to obtain a legislative appropriation during the pendency of their motion to stay in the district court or even after the district court denied their motion for a stay on February 18, 1987. (A.20, 49-50, 75-76, 109-111).

The court was also aware that the petitioners had failed to act even though the first supplemental budget of fiscal year 1987 was submitted by the Governor in March of 1987. (A.98-99). It was also brought to the attention of the court that even though failing to take any steps to obtain an appropriation in March of 1987, the petitioners had waited a month and a half after the district court's denial of the stay motion, until March 31, 1987, to file a motion for stay of judgment pending appeal in the court of appeals. (A.39-42).

The petitioners also were found not to have made "any serious effort" after the

court's May 7, 1987 order issued, "to urge the executive branch to submit to an expedited single item appropriation request to the legislature as opposed to merely requesting that the appropriation occur with the next regularly scheduled supplemental budget." (A.6).

As a result of all the facts presented by the petitioners, the court stated that it was not persuaded that the petitioners had "met their burden of proving that they and other executive officials have done all they could have done to obtain timely legislative appropriation." (A.6). The court stated "[t]he fact that some efforts to obtain such funds were made does not prove further efforts would have been fruitless." (A.6-7).

Because the petitioners failed to demonstrate they had acted diligently and had taken all reasonable steps in obtaining payment, the court of appeals acted entirely

appropriately in holding the petitioners in contempt.

II. The Court of Appeals Was Correct in Holding that Impossibility Was Not A Defense Under the Circumstances.

The petitioners argued to the court of appeals that the federal court lacked the power to ensure compliance with an attorneys fee award against the state unless state law provided a means to enforce such a judgment. The petitioners maintained this position even though they knew that assertion of sovereign immunity would cause irreparable financial harm to the respondents. Petitioners were aware that each day's delay in payment would cause respondents to lose the use of their money or their ability to obtain interest on the money that was rightfully theirs as a result of the district court's judgment.

The court of appeals was confronted

with a situation that directly implicated the ability of the judicial branch to enforce fee awards under the civil rights statute, 42 U.S.C. §1988.

The court was faced with a party which had no incentive to provide resolution of payment through legislative appropriation, since no interest was due on the outstanding judgment. The state was arguing in effect, "you may order a fee to be paid, but you can't make us pay in any reasonably timely fashion." The court determined that only through an order of contempt would enforcement of the fees judgment occur.

This court declared in Hutto v. Finney, 437 U.S. 678, 696 (1978) that any reasonable action may be taken by a court to secure compliance with its orders. "[A] federal court may treat a State like any other litigant when it assesses costs."

The court of appeals was merely

implementing a congressional mandate as to an award of attorneys fees. Here, the court of appeals acted well within its authority to ensure compliance with its lawful rules. "[F]ederal courts are not reduced to issuing [judgments] against state officers and hoping for compliance." Hutto, supra, 437 U.S. at 690. Such a result would be contrary to the command of the Supremacy Clause of the United States Constitution. Federal courts have the power to impose financial penalties against states which refuse to comply with federal court orders. Hutto v. Finney, supra, 437 U.S. at 690-691.

The petitioners argue in their petition to this Court that if a state legislature does not appropriate payment of attorney fees after efforts are made by executive branch officials, the federal courts have no power to enforce the fee orders. Under this reasoning, as long as executive branch

officials make efforts at obtaining an appropriation, the state could avoid payment of fees altogether or delay payments for prolonged periods, while having no obligation to pay post-judgment interest.

As the court of appeals stated, for purposes of liability for an award of attorney fees and costs under 42 U.S.C. §1988, the state is the real party. (A.7). See Kentucky v. Graham, 473 U.S. 159 (1985); Hutto v. Finney, supra, 437 U.S. at 693-700.

It would be anomolous to consider the state the real party for purposes of enforcement of fee awards, but at the same time to allow the executive branch of the state to argue that it is impossible to act because of the failure of the legislative branch of that state to appropriate the funds.

As the court of appeals stated:

> Recognition of the impossibility defense advanced by defendants would

> render enforcement of section 1988 award against state officials impossible, since it is inevitably the case that the state legislatures and not the named officials control the state purse strings.

(A.8).

In the lower court, the petitioners had not asserted that the state was insolvent or that it would have been impossible for the state legislature to have appropriated the money over the almost one year period after judgment had entered in the district court. Thus the court of appeals properly rejected the petitioners impossibility defense. (A.8-9).

Courts confronted with similar questions relating to the federal courts' authority to enforce fee judgments under 42 U.S.C. §1988 have applied an analysis similar to the analysis applied by the court of appeals in this case. See Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980); Gary

W. v. State of Louisiana, 622 F.2d 804 (5th Cir. 1980); Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); Assoc. for Retarded Citizen of N.D. v. Olsen, 561 F.Supp. 495 (D. N.D. 1982); La Raza Unida v. Volpe, 545 F.Supp. 36 (D. N.D. Cal. 1982).

Since under the circumstances presented in this case, the court of appeals was acting well within its judicial authority, there is no grounds for this Court to grant certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

NO. 87-848

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RUBIE ROGERS, HAROLD WARNER, ABLE BOLDEN, WILLIE WADSWORTH, DONNA HUNT, AND JAMES COLLERAN,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

On the same day the pending petition for a writ of certiorari was mailed to this Court, the highest state court in Massachusetts held that the Commonwealth of Massachusetts does not enjoy sovereign immunity from postjudgment interest on an award of attorney's fees

and costs under 42 U.S.C. § 1988. Gaulin v. Commissioner of Public Welfare, 401 Mass. 1001, ___ N.E.2d ___, aff'g, 23 Mass. App. Ct. 744, 505 N.E.2d 898 (1987). The deadline for petitioning this Court for a writ of certiorari to review Gaulin is February 1, 1988.

The petitioners do not believe that either the court's decision in Gaulin or the discretionary decision of the Attorney General of Massachusetts whether to petition this Court to review Gaulin adversely affects the merits of the present pending petition. However, the petitioners are filing this brief because they are mindful of Supreme Court Rule 22.6 and this Court's admonition that "counsel have a continuing duty to inform the Court of any development which

may conceivably affect the outcome" of a case. Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238, 240 (1985), quoting from Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) (emphasis added).

At the heart of the two questions presented by the pending petition are what standards should be applied in civil contempt proceedings against state officials in federal court and what is the proper exercise of the federal court's civil contempt powers in such a case. The answers to these questions are of interest to every state since the Eleventh Amendment, federalism, comity, and equity principles involved are ones on which every state (and state official) should be entitled to rely.

While the contempt order at issue arises from the court of appeals' assumption[1/] that the Commonwealth of Massachusetts enjoys immunity from postjudgment interest on an award of attorney's fees and costs under 42 U.S.C. § 1988, the petition does not ask this Court to decide whether the court of appeals' assumption was correct. Nor, if the petition were granted to review either or both of the questions that are presented, would this Court need to decide whether the court of appeals' assumption was correct. The first question asks whether a federal court may ever use its civil contempt powers to penalize a state official (or state)

1/ The court of appeals never squarely ruled that the Commonwealth enjoyed postjudgment interest immunity. See Pet. at 6 n. 6, 8-14, 25 n. 13.

for refusing to waive a claim of right, privilege, or immunity which the court believes to be valid. The second question could arise in any federal court contempt proceeding against a state official who lacked authority, under state law, to comply with a court order.

Therefore, the petitioners submit that the pending petition for a writ of certiorari to the court of appeals should be granted.

Respectfully submitted,

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